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Volume 3, No. 10, Pages 2643 to 2984, May 8 - May 20, 1988.

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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Citation Form: 2 FCC Rcd 1 (1987)

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Washington, D.C. 20554

CC Docket No. 80-634
and 85-268

In the Matter of

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Revisions to Tariff F.C.C. No. 101, Implementing the Second Memorandum Opinion and Order in CC Docket No. 80-634

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Revisions to Tariff F.C.C. Nos. 101 and 14, Implementing Reconsideration Order in CC Docket No. 80-634 and Report and Order in CC Docket No. 82-540

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Tariff F.C.C. No. 103, Establishing Separate, Unbundled Space Segment Offering

COMSAT INTERNATIONAL COMMUNICATIONS INC. — Transmittal Nos. 1, 2, 3 and 4

Tariff F.C.C. No. 1, Establishing Separate, Unbundled Multipurpose Earth Station Service Offerings in Compliance with Report and Order in CC Docket No. 82-540

COMSAT INTERNATIONAL COMMUNICATIONS, INC. — Transmittal Nos. 1, 2, 3 and 4

Tariff F.C.C. No. 2, Establishing Separate Unbundled Special Purpose Earth Station Service Offering through Santa Paula, California in Compliance with Report and Order in CC Docket No. 82-540

INTERNATIONAL BUSINESS EARTH STATIONS, INC. — Transmittal Nos. 1, 2, 3, 4 and 5

Tariff F.C.C. No. 1, Establishing Offering of International Business Satellite Service at New York Teleport

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1987; Released: January 28, 1988

By the Commission:

I. INTRODUCTION

1. On April 6, 1987 the Common Carrier Bureau released its Memorandum Opinion and Order in the dockets captioned above.[1] That *April 6 Order* tentatively determined that Comsat must refund $61.7 million in revenues accrued which exceeded a 1978 rate of return prescription, in 1983-1986. The *April 6 Order* directed Comsat to show cause why the excess revenues should not be refunded and required Comsat to propose a refund schedule and methodology for public comment, in the event excess revenues were ultimately refunded. The Order also resolved certain cost allocation issues that had been designated for investigation in these dockets.[2] Our decision in this Order is limited to the refund question.

2. Comsat has responded to the *April 6 Order* by asserting that its refund obligation is unfounded in law, and in any case is overstated. Comsat has also submitted a proposed refund methodology and schedule. Several parties have commented on Comsat's response and on its proposed refund methodology.[3] In addition, ITT and Fedex have filed petitions for reconsideration of the Bureau's *April 6 Order*.[4]

3. This Commission has reviewed the record developed in this docket and determined that it presents several unique factual circumstances, described in more detail below. We have taken into account these unique factual circumstances in exercising the equitable discretion inherent in agency consideration of refund matters. Consequently, we have determined that the public interest

would be best served if Comsat's refund liability is limited to revenues accrued by Comsat during the period from August 1, 1984 to December 31, 1986 in excess of its 1978 Settlement Agreement prescription. This amount, totalling approximately $39 million, must be refunded as a lump sum pursuant to paragraph 45, *infra*, with interest calculated in accordance with Appendix C.

II. BACKGROUND[5]

A. *The 1978 Prescription*

4. This Commission first adopted an authorized rate of return for Comsat in 1975.[6] Our decision adopting that rate of return was stayed pending appeal and was subsequently superseded in 1978 by a Settlement Agreement that established an authorized annual rate of return of 11.48 percent with a 1 percent allowance for efficiency.[7] At that time, Comsat had an all equity financial structure. The authorized rate of return was computed by imputing 45 percent debt at a 9 percent interest rate and establishing a hypothetical equity return of 13.2 percent, which reflected the addition of (1) a 4 percent risk premium to the then current yield (8.2 percent) for long-term U.S. government bonds, and (2) a 1 percent increment to reflect the increased risk that a 45 percent debt structure would produce. The resulting 11.31 percent return was adjusted to 11.48 percent to reflect "a synthesis of the gradual imputation of debt over six years . . . " 68 FCC 2d at 951. That 11.48 percent rate of return prescription with a one percent buffer has never been modified.

B. *Comsat Tariff Filings in Response to the Settlement Agreement*

5. The Settlement Agreement mandated a 48.5 percent reduction in Comsat's tariffed rates. On April 27, 1979, Comsat filed tariff revisions further reducing its rates by 15 percent. No petitions were filed to reject, suspend or investigate the 15 percent rate reduction. The tariff revisions became effective on May 15, 1979 without investigation. The Chief of the Common Carrier Bureau subsequently requested information on Comsat's projected rate of return under the revised rates, by letter dated June 25, 1979. Comsat responded by letter on July 24, 1979, in which it projected an average return of 14.17 percent for the latter half of 1979 and alternative projections for 1980 of 9.8 percent and 12.6 percent, depending on the course taken by the notably volatile economy at that time. On December 28, 1979, Comsat filed further revisions reducing its rates by an additional 5 percent. These revisions were also uncontested and became effective without investigation on February 1, 1980. The Bureau again requested information on Comsat's projected rate of return. Comsat projected an average rate of return under the new rates of 17.88 percent in its February 29, 1980 letter to the Chief, Tariff Division (Att. C to Comsat's Response to Show Cause Order).

6. In the summer of 1980, Comsat developed alternative return projections ranging from 14.46 percent to 20.80 percent. Comsat discussed its rate development procedures informally with Bureau staff,[8] and filed tariff revisions on October 22, 1980 under Transmittal No. 384 which generally reduced its rates by 11.8 percent. In the transmittal letter accompanying its proposed revisions, Comsat explicitly noted that its projected rate of return for 1981 with the new rates was between 14.2 and 16.7 percent. No petitions were filed to investigate those charges and the charges became effective on December 24, 1980 without investigation.

C. *Second Structure and Earth Station Ownership Proceedings*

7. In 1980, this Commission initiated a Rule Making (*Comsat Structure Proceeding)* on Comsat's corporate structure, operations, and accounting practices.[9] On April 20, 1984 we released an order in that proceeding (the *Second Structure Order),* [10] in which we prescribed extensive revisions to Comsat's accounting practices. The revised accounting practices reduced certain jurisdictional accounts thereby decreasing the revenue requirement underlying Comsat's rates. 97 FCC 2d at 179. Accordingly, the Commission directed Comsat to file tariff revisions that would reflect the lower revenue requirement and would "be in compliance with its authorized rate of return (11.48% - 12.48%)."[11] Comsat filed tariffs in purported compliance with the *Second Structure Order* which became effective on August 1, 1984.

8. In its petition for reconsideration of the *Second Structure Order*, Comsat challenged the requirement that its re-filed tariffs comply with the 11.48 percent rate of return requirement. Comsat contended that this Commission lacked authority to order such tariff revisions without a hearing under Section 205 of the Act. Comsat further argued that we were required to consider changes in the economy and the corporation since 1978 before requiring it to abide by the rate of return set in the Settlement Agreement. In our *Second Structure Reconsideration Order*,[12] we rejected Comsat's arguments, stating, *inter alia* :

> Comsat had every opportunity since the 1978 Settlement Agreement to petition us for relief if it believed its authorized rate of return was too low and did not reflect the changed circumstances to which it refers in its petition for reconsideration. For whatever reason, it did not do so. Until it does so and until relief is granted, Comsat shall submit tariffs reflecting cost-based rates that will earn the corporation its authorized rate of return. Comsat simply cannot unilaterally modify its authorized rate of return.

***Second Structure Reconsideration*, 99 FCC 2d at 1055-56.**

9. In 1984, we released an order in our *Earth Station Ownership* proceeding.[13] In that proceeding, we concluded that Comsat should be required to provide its earth station services through a separate subsidiary and pursuant to cost-based rates unbundled from its space segment rates. Accordingly, Comsat filed tariffs which became effective in 1985 that provided separate rate schedules for its space and earth segment services.

D. *April 6 Order*

10. The Common Carrier Bureau reviewed Comsat's various tariff filings in response to the *Structure* and *Earth Station Ownership Orders* and concluded that it should investigate a number of issues raised by the filings.[14] The *April 6 Order* resolved some of those issues while deferring the resolution of others pending further development of the record. The investigation also revealed that the rates under review had produced earnings in excess of

Comsat's authorized level. Accordingly, the *April 6 Order* directed Comsat to refund the excess or show cause why it should not be required to do so.

III. DISCUSSION

A. *Refund Authority*

1. Pleadings

11. The Comsat response to the show cause order presents three alternative contentions. First, Comsat argues that this Commission does not have the power to order refunds for the violation of a rate of return prescription. Second, Comsat contends that the 1979 and 1980 decisions to accept tariffs that were expressly targeted to produce a greater return effectively vacated the 1978 rate of return prescription. Third, Comsat urges that, even if the prescription remained effective, it would be inequitable to apply that prescription to periods that precede the *Second Structure* decisions which "revive" the 1978 prescription.

12. Comsat's general arguments relating to this Commission's refund power are essentially the same as the arguments that AT&T and the Bell Operating Companies presented in another refund proceeding.[15] Those arguments were decisively rejected in a Court of Appeals opinion[16] issued shortly after Comsat filed its response in this proceeding. We have accordingly concluded that the pleadings on this subject do not warrant further discussion.

13. Comsat's second claim, that the 1978 rate of return prescription has lapsed, is based upon the series of events outlined in Section II.B., *supra*.[17] Comsat says that it filed a series of tariffs that were targeted to earn more than the prescribed return, that the Commission or the Common Carrier Bureau staff was informed orally and in writing that the rates were targeted to earn more than 11.48 percent, and that these "tariffs were permitted to go into effect without objection from the Bureau or anyone else . . . ."[18] Comsat also says that it submitted data to demonstrate the effect of double-digit inflation on the Comsat cost of capital and that this submission was discussed at a series of meetings with Common Carrier Bureau staff in the summer of 1980. Comsat describes this process as an application of the "continuing surveillance regulation" described in 1962 and 1971 statements of former Commission Chairmen. Comsat contends that the decision to accept the tariffs after consideration of Comsat's rate of return submissions "eliminated" the 1978 rate of return prescription. It also contends that a new proceeding would be required to establish a new rate of return prescription or to reinstate the old one.

14. Some of the replies dispute Comsat's claim that the 1978 prescription has been eliminated. For example, Univision says that the "argument that tariff revisions which were never the subject of an affirmative Commission order and which became effective through Commission silence and inaction, somehow superseded or nullified the rate of return prescribed in the 1978 Settlement Agreement . . . is contrary to law" and unfair to Comsat's customers.[19] Univision contends that the Commission's inaction, i.e., its acceptance of the tariff filings without investigation, has no bearing on the lawfulness of the rates.[20]

15. Fedex says the argument that accepting tariffs without investigation changed the prescription is "startling" and "[c]ontrary to a wealth of judicial and administrative precedent."[21] It contends that only prescribed rates are immune from refund liability,[22] that Bureau inaction on the tariffs Comsat filed is "without legal significance,"[23] and that the 1980 discussions with Commission staff are irrelevant because "the Bureau had no authority to waive or modify the full Commission's 1978 Comsat rate of return prescription order."[24] Fedex also notes that this Commission has rejected claims that general fluctuations in the economy can affect an outstanding rate of return prescription in the absence of a petition to modify the prescription.[25] Finally, Fedex emphasizes that the Commission prescription was reaffirmed in 1984 "and Comsat has never sought appellate review of the 1984 reaffirmation nor petitioned the Commission to vacate the prescription order."[26]

16. In support of its third argument, that events make compliance with the prescription inequitable prior to mid-1984,[27] Comsat notes that this Commission first directed Comsat to retarget rates to comply with the 1978 prescription in the April 1984 *Second Structure* Order and affirmed that view in the December 1984 *Second Structure Reconsideration*. Fedex says that the equities are against Comsat because Comsat intentionally and substantially exceeded the prescribed return.[28] Finally, Comsat contends that it would be improper to order refunds for earlier periods because the Common Carrier Bureau initiated this docket to investigate tariffs filed in 1984 and 1985 and did not specify any issues involving earlier tariffs for investigation.

2. Discussion

17. As noted in paragraph 12 above, Comsat's argument that this Commission lacks refund authority has been rejected by the Court of Appeals. In addition, we cannot accept Comsat's second argument that the rate of return prescription was eliminated in 1979 or 1980. We believe that such an argument is foreclosed by our decisions in the *Second Structure* proceeding. Those orders unequivocally concluded that the 1978 prescription is still in effect and will remain in effect until a proceeding is initiated and completed to vacate or modify that prescription. Comsat did not appeal those decisions and should not be permitted to reopen the question now.

18. Moreover, Comsat's argument would not be persuasive even if we decided to entertain a collateral attack upon the *Second Structure* orders. Comsat's analogy to the continuing surveillance process that was used to regulate AT&T in an earlier era does not fit this situation. We have always used formal procedures to establish or modify the AT&T authorized return since 1967.[29] Moreover, Commission prescriptions that have been embodied in a formal Commission order have been modified by a formal Commission order. The informal discussions in 1979-80 between Comsat personnel and Bureau staff did not result in any Commission or Bureau order that purported to vacate, modify or waive the rate of return prescription. Those informal processes also did not produce any document that purported to notify any Comsat customer that the rate of return prescription might be modified.

19. We have concluded, however, that there is some merit to Comsat's third contention. The course of events Comsat has described creates equitable considerations that warrant limiting refunds to the August 1984 through the

December 1986 period. In the following paragraphs, we state the reasons for our conclusion. In view of that conclusion, we need not consider Comsat's claim that, because the Bureau did not designate earlier tariffs for investigation when it opened this docket, pre-1984 refunds are precluded.

20. In determining the refund appropriate to the instant case which best serves the public interest, we are mindful that we must exercise our refund authority with due regard for the factual circumstances of individual cases and the equitable considerations they create.[30] In *Las Cruces TV Cable v. FCC*,[31] the Court reviewed this Commission's first articulation of standards for ordering refunds. There, the Court noted that judicial review of agency refund decisions has been marked by "great deference . . . perhaps based upon the discretionary nature of their refund power, but [courts] have nevertheless looked closely to see if the agency had considered relevant factors and if it had struck a reasonable accommodation among them."[32] In *Wisconsin Electric Power v. FERC*,[33] the Court held that the standard of review for an agency refund order is whether the order is "equitable in the circumstances of [the specific] litigation."

21. *Earnings before August 1, 1984* [34] -- Applying these standards to the instant case, we have decided to order Comsat to refund only those excess revenues accrued after August 1, 1984, the effective date of the tariffs filed in compliance with the *Second Structure Order*. The events underlying Comsat's rate of return prescription as well as our regulatory treatment of the carrier in the years immediately following the Settlement Agreement present several unique factual circumstances which persuade us that this exercise of our discretion best serves the public interest.

22. As previously noted, Comsat filed a series of tariff revisions in which it explicitly targeted its proposed rates to earn above the prescribed rate of return. Those rates became effective without Commission action. In response to the earlier of these filings, the Bureau requested information about the return anticipated by Comsat, but took no formal action. The subsequent revisions were explicitly targeted well above Comsat's authorized rate of return, but still became effective without challenge by affected customers or the Bureau. Indeed, until the time of the *Second Structure Order*, the Commission took no action with respect to Comsat's tariffs solely on the basis of its improper targeting of a rate of return. Moreover, our inaction followed discussions between the Bureau and Comsat and letter submissions by Comsat which explicitly stated that Comsat had targeted its rate of return to exceed its prescribed level. We have concluded that our inaction on Comsat's proposed rates, in the face of our specific knowledge that Comsat's targeted rates exceeded the prescribed level, led Comsat to assume that we were no longer enforcing the rate of return prescribed in the Settlement Agreement, and that no further action on its part was required to obtain a change in the rate.

23. Our inaction would not have provided Comsat with a defense in a Section 208 complaint proceeding if Comsat's customers had chosen to pursue that remedy in a timely manner. Nor does it provide Comsat with a legal defense in the context of the present investigation. Nevertheless, it is a relevant consideration in determining whether we should exercise our discretionary refund powers to provide relief which those customers can no longer obtain in a Section 208 proceeding.[35] The customers' failure to file petitions or complaints pursuant to Section 208 is also a relevant factor. Comsat provides most of its services to other carriers who knew, or should have known, that Comsat's rates, although substantially reduced, were nevertheless targeted to exceed the prescribed return.

24. We have taken into account an additional equitable factor in determining the refund appropriate to these circumstances, namely, the likelihood that Comsat could have made a persuasive showing that it was entitled to a change in its authorized rate of return level. Based on the actual economic conditions during the 1980-84 time period, we believe it is likely that Comsat would have succeeded in obtaining such a change. Financial and business conditions have not been stable over the ten years since the Settlement Agreement. Arguably, economic circumstances had made the 11.48 percent six-year average outdated by the end of the first year it was in effect. Interest and inflation rates during 1980-84, including those to which the Settlement Agreement's prescription was pegged, soared to unprecedented heights. The Treasury bond rate at the time of the Settlement Agreement was 8.2 percent, but by 1980 it had risen to 10.8 percent and by 1982 had risen to 12.2 In 1983, the rate had dropped only to the 1980 level. The A-rated corporate bond rate rose from 9 to 12.9 percent in 1980, reaching 15.4 percent in 1982 and dropping only to 13.1 in 1983. Treasury and corporate rates only returned to 1978 levels in 1986. Indeed, a review of these economic indicators demonstrates that Comsat's revenues do not substantially exceed those that probably would have been authorized, had periodic adjustments to the 1978 return prescription been made under the Settlement Agreement's methodology to reflect prevailing economic conditions. The formula used in the Settlement Agreement to derive the prescribed level would have produced higher rates of return if actual prevailing interest rates during the relevant time periods are substituted for the projections in the Settlement Agreement Order. For example, as described in Appendix B, annually adjusting the Settlement Agreement's assumptions to reflect prevailing rates for taxable Treasury bonds and A-rated corporate bonds would have resulted in an average return for the 1978-1983 period of 14.11 -15.11 percent.

25. If Comsat had filed a rate of return represcription petition in 1979 or 1980, we might, of course, have adopted a different methodology to determine a new authorized rate. Nevertheless, it seems likely that any methodology could have produced a higher rate of return if the decision was made during a period that was marked by high inflation and very high interest rates. We note, for example, that the AT&T authorized return was represcribed in 1981 to replace the 1976 9.5 percent prescription with a 12.75 percent prescription. In light of these changes in economic conditions after the adoption of the Settlement Agreement, we have concluded that our equitable adjustment to Comsat's refund liability is fair to ratepayers and consistent with the public interest since it is unlikely that Comsat's rates during the pre-August 1, 1984 period were unjustly or unreasonably high.

26. We emphasize here that all aspects of these unique factual circumstances are crucial to our allowing Comsat to retain the revenues accrued prior to the *Second Structure Order*. Absent our knowing acceptance of, and failure to investigate, explicitly "excessive" rates (uncontested by

ratepayers), or the surrounding anomalous economic conditions, the equitable considerations would be fundamentally different.[36]

27. We also emphasize that while Comsat could have believed that this Commission had suspended enforcement of the rate of return prescribed in the Settlement Agreement, Comsat could not have reasonably assumed, as a legal matter, that its tariff revisions were lawful merely from their effectiveness. It is well settled that a tariff's becoming effective without investigation does not imply that the tariff is ultimately lawful, or that the tariffed rates were properly targeted. Nor does its effectiveness prevent the filing of Section 208 formal complaints.[37] We are determining herein only that Comsat's reliance on our inaction is a relevant equitable factor in our analysis of Comsat's refund liability and, under the unique factual circumstances in this case, the public interest is served by exercising our equitable discretion in the manner set forth herein.

28. We are mindful of the Court's statement in *New England Telephone*, that once the Commission prescribed a maximum rate of return, "it was not reasonable for the carriers to think that the agency had an affirmative policy of permitting carriers who earned [above their authorized level] . . . to retain the unlawful excess."[38] Were it not for the unique factual circumstances of this case, Comsat's expectation that it would be permitted to retain revenues in excess of its authorized return would be irrelevant to the question of its refund liability. We believe, however, that the equitable considerations identified in the preceding discussion warrant our departure from the result otherwise indicated by purely legal analysis.

29. *Earnings after August 1, 1984* -- The considerations that persuade us not to require refunds for excess earnings before August 1, 1984 do not apply to the period following the August 1, 1984 effective date of tariff revisions filed in compliance with the *Second Structure Order*. In that *Order*, the Commission unequivocally re-affirmed the continuing validity of the Settlement Agreement rate of return. Thus, the Order, for the first time since 1978, gave Comsat unambiguous notice that the rate of return prescription in the Settlement Agreement remained in effect. Moreover, by mid-1984, relevant interest rates were no longer at the extraordinarily high levels prevailing in the early 1980's. Accordingly, after the release of the *Second Structure Order*, the equities are no longer balanced in Comsat's favor since it could no longer assume that our inaction on its tariffs reflected a *de facto* abandonment of the Settlement Agreement's rate of return prescription.

B. *Applicable Rate of Return*

30. The *April 6 Order* used the 12.48 percent maximum return to compute excess earnings. That is consistent with the procedure this Commission used to compute the AT&T - BOC refund for excess 1978 earnings [39] and the new Part 65 procedures for computing AT&T and local exchange carrier refunds for excess earnings.[40] The 1978 refund was based, and the Part 65 refunds will be based, upon the maximum return rather than the return that the carrier is supposed to use to target rates.

31. Fedex International Transmission Corporation (Fedex) and ITT World Communications Inc. (ITT Worldcom) have petitioned for reconsideration of the *April 6 Order*, contending that the Common Carrier Bureau erred in premising its calculations of excess revenues on the upper bound of Comsat's authorized range of return. Fedex argues that the incremental one percent can be obtained only through internal operating efficiencies, citing the Commission's instructions to Comsat in the *Second Structure Reconsideration Order*.[41] Fedex also cites this Commission's determination in AT&T Charges for Interstate Telephone Service, 51 FCC 2d 619, 626 (1975), that the filing of a tariff designed to produce a rate of return in excess of the prescribed return is *prima facie* unlawful.[42] ITT, for its part, asserts that there is no record evidence, nor explicit finding in the Bureau's *April 6 Order*, suggesting that Comsat's excess earnings resulted from operating efficiencies. To the contrary, Comsat has conceded that its excess revenues resulted from rates explicitly targeted to a return above that prescribed in 1978.

32. In the 1975 *Comsat Rate Case*, this Commission stated that the purpose of establishing a range of rate of return "is to provide a carrier with the incentive, on a rate designed to yield a return at the low end of the range, to achieve a return at the upper end of the range through operating and internal efficiencies."[43] In addition, this Commission has long recognized the imprecision inherent in requiring carriers to set tariff rates that will produce the exact level of revenues necessary to produce the anticipated return. AT&T, 9 FCC 2d 30, 51-88 (1967); AT&T, 38 FCC 2d 213, 248-51 (1972). A "buffer" increment above the prescribed return "in order to provide an incentive to increase productivity and efficiency" was employed in this Commission's 1976 prescription of a return for the AT&T system. AT&T, 57 F.C.C. 2d 960, 973 (1976).

33. In the *Authorized Rates of Return* proceeding,[44] this Commission rejected the argument that the target rate of return, rather than the upper bound of the permissible range, be used for the calculation of excess earnings by AT&T and local exchange carriers. *Authorized Rates of Return*, 58 RR 2d at 1656. We explained that the use of a range for enforcement purposes recognizes the inevitable fluctuations in a carrier's cost of capital, as well as changes in the state of the economy generally:

> Disallowing any earnings 'peaks,' while ignoring the 'valleys,' would tend to induce a systematic bias that would cause a carrier to fall short of its targeted rate of return over the long run. Such a situation is not in the interests of shareholders or in the long run interest of ratepayers.[45]

34. We did not depart from that practice by requiring in the *Second Structure Order* and reiterating in the *Second Structure Reconsideration* that Comsat properly target its rates at the 11.48 percent return level as an initial matter. The initial targeting of rates at the prescribed level of return raises concerns which differ from those raised by the after-the-fact, equitable balancing of ratepayer and shareholder interests that we are engaging in here. The cited statements were not, and could not reasonably be, intended to specify a standard for the eventual review of actual earnings, given the uncertainties of actual operations and possible changes in the economic environment, but were directed to the carrier's obligation to develop rates initially. Confirming this fundamental distinction, this Commission's consistent practice in the refund context has been to accord carriers the full "buffer" increment, as in the AT&T refund case, in which this Commission ordered the refund of only those revenues exceeding the "buffer." Moreover, Comsat's excess earnings represent the same kind of targeting error that the

Part 65 rules are designed to remedy and the same considerations warrant an allowance for targeting error. The same considerations also warrant viewing differentials that earlier Commissions described as an "efficiency" allowance as an allowance for targeting error. We will accordingly limit refunds to earnings that exceeded the 12.48 percent maximum return.

C. *Subject Carriers*

35. Comsat contends that because there has never been a separate Commission proceeding to determine the appropriate rate of return for the earth station operations of its subsidiary, Comsat International Communications Inc. (CICI), no refunds should be ordered in connection with its multipurpose earth station services. Comsat's assertion that CICI's distinct risk profile and its relatively small rate base distinguish it from space segment operations fails to recognize that the return prescription for Comsat was not developed for Comsat's space segment alone. In addition, one of our considerations in allowing Comsat to retain revenues up to the limit of its return prescription, apart from the inherent imprecision of revenue targeting, is that Comsat has achieved operational efficiencies as the result of its compliance with our structural reform orders. Therefore, absent a far more persuasive showing from Comsat, equitable considerations do not warrant a distinct treatment of excess revenues attributed to CICI.

D. *Implementation of Refund*

1. Refund Methodology

36. In its proposed refund schedule and methodology, Comsat urges this Commission to implement any refund of excess revenues by a prospective rate adjustment to its customers over some period of future operations, rather than the more "classical" refund of a lump sum to parties that were customers of Comsat during the period excess revenues accrued. *New England Telephone, supra* n.15, recently held that our statutory refund authority comprehends both approaches. Therefore, we have carefully considered the equitable and administrative factors related to both.

37. Comsat contends that a lump sum refund payment in excess of $20 million would impair its flexibility and capability to maximize growth. Comsat proposes instead that its refund liability be dispersed prospectively, by offsets to future bills rendered its customers, who are primarily carriers. This approach thus contemplates no reduction in Comsat's revenue requirement or in its tariffed rates. Comsat contends such an approach better effects a flow-through of refunds to the customers of Comsat's customers, that is, end users. According to Comsat, some end users who contributed to the excess revenues, in the form of higher rates from Comsat's carrier customers, may have since shifted to carriers that were not providing substantial service during the earlier period. Such end users would be disadvantaged by the lump sum approach, because the carriers from whom they now receive service would be entitled to receive a smaller share of the refund. Finally, Comsat states that it would add excess revenues attributable to its multipurpose earth station operations, which are to be discontinued at the end of 1987, to the space segment refund pool.

38. The parties commenting on Comsat's proposal observe that Comsat's proposed refund method would require carriers to continue or expand their relations with Comsat in order to recoup their refunds. Those parties contend that this result would effectively restrict competition in international services. The parties also argue that Comsat's proposal would effectively burden traditional international record carriers (IRCs) with the support of newer carriers. Those parties respond to Comsat's claim that fairness for end users is better achieved by a prospective approach by observing that some end users who previously took service from carriers who provided limited service during the accrual period may now take service from larger carriers, who provided a greater share of service during the accrual period and who would therefore be entitled to a greater share of the refund.

39. Comsat customers note that lump sum refunds were used in the first Comsat rate case, which exceeded $100 million, and refunds ordered under Bell System OCC facilities tariffs. Further, they contend, the principal difficulty associated with lump sum refunds has been the administrative difficulty and economic inefficiency of identifying and locating numerous customers who are entitled to modest refunds. Those parties say that consideration is not relevant here since Comsat's customers are small in number. Customers finally contend Comsat's proposal to calculate discounts on customer bills would constitute a violation of Section 203 of the Act, 47 U.S.C. § 203, prohibiting rebates, and Part 61 of this Commission's Rules, 47 C.F.R. Part 61.

40. We have concluded that the disadvantages of the prospective rate adjustment approach urged by Comsat clearly outweigh its advantages. The principal beneficiary of this approach would be Comsat, when Comsat has already had the use of these excess revenues for several years. Comsat's competitors in international services would be disadvantaged in a way that would frustrate efforts to promote competition in the provision of international services. Moreover, a prospective approach would promote time- and resource-consuming controversies over Comsat's traffic projections and the allocation of refunds between space and earth segments, as Comsat no longer owns its multipurpose earth stations.

41. Finally, Comsat's assertions regarding its ability to bear the refund burden imposed today are not substantiated sufficiently to demonstrate that the carrier's financial health or prospects would be significantly impaired. Therefore, we will order a lump sum refund payment so that end users may directly and speedily receive the benefits of these payments.

42. Consistent with the calculation of interest explained in Appendix C, we have determined Comsat's refund liability for the period from August 1, 1984 to December 31, 1986 to be that displayed in the table below, based on interest accrued to December 31, 1987 (dollars in thousands):[46]

Aug.-Dec. 1984	
Refund Amount	5306.0
Interest	1618.0
	6924.0

Jan.-Dec. 1985	
Refund Amount	13,856.0
Interest	2,563.0
	16,420.0
Jan.-Dec. 1986	
Refund Amount	14,139.0
Interest	1,273.2
	15,411.0
Total	**38,755.0**

2. Disbursement Methodology

43. While we have concluded that Comsat must refund certain excess earnings, we are not ordering that refunds be disbursed to Comsat's carrier customers at this time. We have decided to obtain additional comment on the appropriate allocation of the refund among Comsat's carrier customers and on several flow-through questions before we order disbursements. We will accordingly require Comsat to place the entire refund amount in an escrow on or before February 29, 1988, and will issue instructions for payments from the escrow in a subsequent order.[47] The actual interest earned on the escrow account will inure to the ultimate beneficiaries.

44. The Bureau's *April 6 Order* tentatively concluded that Comsat's carrier customers should be required to pass through to their customers any refunds they receive from Comsat. This determination is consistent with prior Commission practice in implementation of rate reductions.[48] Comsat's non-dominant international carrier customers, in responding to Comsat's proposed refund methodology, have criticized the Bureau's proposed flow-through requirement on a variety of grounds. First, they state that a mandated flow-through would be inconsistent with their non-dominant status. They argue that flow-throughs should not be ordered for entities who are not rate-base regulated.[49] Second, these carriers indicate that their rates are driven by market forces to be close to costs, that they have not overcharged end-users (and indeed have "absorbed" a portion of Comsat's overcharges), and that their returns have been substantially less that Comsat's. Third, they state that past Commission practice (i.e., ordering a flow-through) is not relevant since the question of flow-throughs for non-dominant carriers is a case of first impression. They conclude by arguing that flow-throughs are discretionary and should not be ordered for non-dominant carriers under the existing circumstances. In its comments, AT&T states that until a refund mechanism is finalized it would be premature to attempt to establish the specifics of a flow-through plan. AT&T suggests that Comsat's carrier customers receiving refunds be permitted to propose a method of treating those refunds after the refund mechanism is adopted.

45. We remain convinced that these refund payments should inure to the benefit of ratepayers. Non-dominant carriers pricing close to cost because of market forces will receive what amounts to a significant reduction in their costs. We believe that their rates should reflect such cost reductions.[50] Dominant carriers, for their part, will be receiving payments which should be reflected in their accounts and rate development calculations. Nevertheless, we believe that the record warrants giving Comsat's carrier customers a specific opportunity to further address this issue and propose a specific flow-through methodology. Accordingly, interested parties may file comments on these issues no later than 30 days from the release date of this Order. Replies may be filed by any party fourteen days thereafter. In their filings, Comsat's carrier customers should propose specific methodologies for implementing flow-throughs of Comsat's refund. These parties should also identify the portion of Comsat's refund to which they believe they are entitled, as well as the data and calculations underlying their claim.[51]

IV. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201(b) and 205(a) of the Communications Act, 47 U.S.C. §§4(i), 201(b), and 205(a), that Comsat is required to refund to its customers taking service between August 1, 1984 and December 31, 1986, the aggregate sum of $38.755 million dollars, representing the revenues accrued during that period in excess of 12.48 percent return and accrued interest as calculated in Appendix C, to be apportioned between these customers on a basis reflecting the charges for service incurred by customers. The aggregate sum, less amounts due to end user customers, shall be deposited in an interest bearing escrow account on or before February 29, 1988 and the costs of administering that account shall be borne by Comsat. The simple interest accruing from December 31, 1987 to the date of deposit in escrow shall be calculated by Comsat consistent with the method of Appendix C, using the current Internal Revenue Service rate, and added to the $38.755 million figure stated above. Sums owed to end user customers shall be paid by Comsat on or before February 29, 1988 and the aggregate refund sum placed in escrow reduced accordingly.

47. IT IS FURTHER ORDERED that the Secretary shall, by registered mail, serve a copy of this decision upon the Communications Satellite Corporation in accordance with Sections 416 and 413 of the Communications Act of 1934, as amended, and shall enter proof of service in the docket in this proceeding.

48. IT IS FURTHER ORDERED that the Secretary shall transmit a copy of this order to the American Telephone & Telegraph Co. and to each party filing comments in this proceeding.

49. IT IS FURTHER ORDERED, that in addition to the filing requirements generally imposed by this Commission's Rules for docketed investigations, a separate copy of pleadings responsive to this Order shall be filed with the Commission's commercial contract duplicator; the Chief, Common Carrier Bureau; the Chief, Tariff Division; the Chief, International Facilities Division; and the respective divisions' reference rooms.

50. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau is authorized to require Comsat to make such minor adjustments to the escrowed amount as may be necessary to correct errors in, or reflect technical modifications to, the data or calculations underlying the refund ordered herein.

51. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Fedex International Transmission Corporation and ITT World Communications, Inc. ARE DENIED.

52. IT IS FURTHER ORDERED, that comments on the flow-through issue discussed herein SHALL BE FILED not later than 30 days after release of this Order, and replies SHALL BE FILED not later than 45 days after release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

Comsat filed its response to the show cause elements of the *April 6 Order* May 15, 1987, but failed to submit a refund methodology. Pursuant to the Bureau's procedural consolidation order of Jun. 17, 1987, 2 FCC Rcd 4417, Comsat submitted its proposed refund schedule and methodology July 10, 1987; parties' comments on that proposal and on Comsat's response were submitted July 31, 1987 in various configurations. Fedex International Transmission Corporation (Fedex) submitted separate pleadings addressing (i) Comsat's response and (ii) refund and flow-through issues. FTC Communications, Inc. (FTCC) and MCI Communications Corporation (MCI), the latter on behalf of Western Union International (WUI), MCI Telecommunications Corporation (MCIT) and MCI International, Inc. (MCII), each submitted comments on the refund methodology and flow-through issues. TRT Telecommunications Corporation (TRT) and Univision, Inc. (Univision) each addressed Comsat's response and its refund methodology in integrated comments, while Turner Broadcasting System, Inc. (TBS) limited its response to the proposed refund method, as did Pan American Satellite (PAS) and RCA Global Communications, Inc. (RCA Globcom). Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. (Networks) also commented on Comsat's refund proposal. Additionally, the Bureau's procedural consolidation order (DA 87-735, released June 17, 1987) did not rule on Univision's request that its comments on the networks' joint application for review of the *April 6 Order* be accepted as an additional pleading under Section 1.45 of the Commission's Rules, 47 C.F.R. §1.45. Univision's comments endorsed concerns raised by the networks respecting Comsat's treatment of Intelsat cost components in the development of occasional television service rates. While the networks have withdrawn their application for review (n4, *infra),* the concerns raised by Univision were originally proffered under its previous corporate name (SIN, Inc.) in petitions directed to the television tariff revisions captioned in the Bureau's investigation, and Univision's comments will be included in the record for subsequent consideration of those issues.

APPENDIX B

Table 1

Rate of Return Prescribed for COMSAT
as Calculated under the Settlement Agreement
Adopted in Docket No. 16070

	Equity Capital		Debt Capital		Weighted Average
Year	Return	Weight	Return	Weight	Cost of Capital
	(A)	(B)	(C)	(D)	(E=A*B+C*D)
1978	12.2%	1.00	9.0%	0.00	12.20%
1979	12.2%	0.91	9.0%	0.09	11.91%
1980	12.2%	0.82	9.0%	0.18	11.62%
1981	12.2%	0.73	9.0%	0.27	11.34%
1982	12.2%	0.64	9.0%	0.36	11.05%
1983	12.2%	0.55	9.0%	0.45	10.76%

Average return over 6 year period: 11.48%

Notes:

Column (A) - The current long-term government bond yield (8.2 percent at the signing of agreement) plus a 4 percent risk premium.

Column (B) - 100% equity financing assumed in first year, declining to 55 percent at the end of six years.

Column (C) - The cost of debt was assumed to be the rate for an A-rated public utility. (9.0 percent at signing of agreement)

Column (D) - Debt to be acquired at the rate of 9 percent per year, starting in 1979 and continuing until 45% of capital is reached.

APPENDIX B

Table 2

Docket No. 16070 Prescription Methodology,
Adjusted to Actual Interest Levels

	Equity Capital		Debt Capital		Cumulative Weighted Average
Year	Return	Weight	Return	Weight	Cost of Capital
	(A)	(B)	(C)	(D)	(E=A*B+C*D)
1978	12.20	1.00	9.00	0.00	12.20
1979	12.74	0.91	10.20	0.09	12.51
1980	14.81	0.82	12.89	0.18	14.22
1981	16.87	0.73	15.29	0.27	15.77
1982	16.23	0.64	15.43	0.36	15.23
1983	15.84	0.55	13.10	0.45	14.73

Average return over 6 year period: 14.11

Notes:

Column A - Assumed to be the current long-term government bond yield plus a 4 percent risk premium. The entry for 1983 includes an extra one percent risk premium to reflect that COMSAT had obtained a capital structure with 45 percent debt.

Column B - 100% equity financing assumed in first year, declining to 55 percent at the end of six years.

Column C - Return on Moody's A Rated Corporate Bonds, from Survey of Current Business, US Dept of Commerce, various issues.

Column D - Debt financing to increase by 9 percent per year, starting in 1979 and continuing until 45% of capital is reached.

Column E - The weighted average cost of capital is equal to the cost of equity times its weight in the capital structure plus the cost of debt times its capital structure weight. The calculation underlying these figures assumes that the cost of each increment of debt is the cost of debt in the year it was added.

APPENDIX C

COMSAT Refund Liability
For the Period August, 1984 through December, 1986
(Dollars in Thousands)

Year	Avg Net Invest	Net Op Income	Return Earned (Annual)	Excess Earnings (r=.1248)	Excess Revenue
	(A)	(B)	(C=B/A)	(D=Ar-C)	(E=D/1-t)
1984	$398,266	$23,421	14.11%	$2,711	
1985	$404,843	$57,605	14.23%	$7,081	$13,856
1986	$421,338	$59,808	14.19%	$7,225	$14,139
Total					$33,301

Interest				Refund Revenue
1985	1986	1987	Total	+Interest
(F=.12E)	(G=.095E)	(H=.09E)	(I=F+G+H)	(J=E+I)
$637	$504	$478	$1,618	$6,924
$0	$1,316	$1,247	$2,563	$16,420
$0	$0	$1,273	$1,273	$15,411
			$5,454	$38,755

Notes:

The *April 6 Order*'s tentative refund calculation did not include excess revenue data for July, 1985 because changes in Comsat reporting procedures made to reflect the *Second Structure Order* result in a discontinuity in the data reported monthly by Comsat on its Form 901 between June and July, 1985. Specifically, data presented by Comsat for the months prior to July, 1985 (Revised Exhibit D1 at 1-8) are for combined earth and space operations, while data presented for the months of July 1985 and later (Revised Exhibit D1 at 9) separate space and earth operations. The figures adopted today reflect inclusion of data for July, 1985. Consistent with the rate base calculation methodology used in the *April 6 Order*, we have developed rate base and revenue data for July 1985 by combining the separately reported figures for Comsat's earth and space segment operations.

Columns A&B - Data for August, 1984 through June 1985 taken from Comsat Response (dated March 3, 1986, revised July 9, 1986), Exhibit D1, pages 7-8. Data for July, 1985 through December, 1986 taken from FCC Form 901.

Column A is calculated by adding the end of month rate base for the current month with the previous month and dividing by two.

Column C - The 1984 row covers only the last five months of the year. The realized rate of return was annualized by multiplying B/A by 12/5. The 1985 and 1986 rows cover full years.

Column D - The excess earnings calculation assumes an allowed rate of return of 12.48%.

Column E - The calculation assumes a 48.9% tax rate. E=D*(1-.48.9))

Column F - The interest rate used for 1985 is the average of the Internal Revenue Service (IRS) refund interest rates in effect in 1985. Jan.-Jun: (13%); Jul-Dec: (11%). *See* IRS Notice 746.

Column G - The 1986 interest rate was the average of the Jan-Jun: (10%) and July-Dec: (9%) IRS rates.

Column H - The 1987 interest rate was the Jan-Dec: (9%) IRS rate.

Column I - The sum of Columns F through H. Note that interest computations assume that refund liabilities were incurred at the end of each year, and that the refund will be made on December 31, 1987. The interest computations assume no compounding.

Column J - The total refund obligation as of 12/31/87 is the sum of columns E and I. The sum of E and I differs from Column J for 1985 and 1986 due to rounding.

FOOTNOTES

[1] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, 2 FCC Rcd 3706 (1987) (*April 6 Order*).

[2] For a discussion of these cost allocation issues, see Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Mimeo No. 0672, released Nov. 8, 1985, (*Designation Order*) ; Erratum, Mimeo No. 1703, released Dec. 27, 1985.

[3] The pleadings received since the *April 6 Order* are described in Appendix A.

[4] Comsat responded to the petitions for reconsideration and application for review on June 26, 1987; replies were submitted July 10, 1987 by ITT, Fedex, the Networks and TBS. An application for review filed by Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc., initially supported by Turner Broadcasting System, Inc., has been withdrawn.

[5] The procedural history of these dockets is set forth in greater detail in the *April 6 Order* and the *Designation Order*. In this section, we summarize only those events relevant to the instant refund.

[6] Communications Satellite Corporation, 56 FCC 2d 1101 (1975).

[7] Communications Satellite Corporation, 68 FCC 2d 941 (1978).

[8] Comsat Response to Show Cause Order at 25-26. There is no record of the content of those discussions. We note, however, that this Commission is not bound by informal discussions with our staff, nor can parties reasonably rely on them. *See* , *e. g.*, Southern New England Tel. Co., FCC 87-128, n.78, released Apr. 22, 1987.

[9] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 81 FCC 2d 287 (1980).

[10] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, CC Docket No. 80-634, Second Memorandum Opinion and Order, 97 FCC 2d 145 (1984) (*Second Structure Order*) ; *recon.*, 99 FCC 2d 1040 (1984) (*Second Structure Reconsideration*).

[11] *Id.* at 179.

[12] 99 FCC 2d 1040 (1984).

[13] Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the Intelsat Global Communications Satellite System, CC Docket No. 82-540, 100 FCC 2d 250 (1984).

[14] *See* note 2, *supra*.

[15] AT&T Earnings on Interstate and Foreign Services During 1978, 102 FCC 2d 52 (1984), *aff' d sub nom.* New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. August 21, 1987) (*New England Telephone), petition for rehearing pending.*

[16] *Id.*

[17] Response at 24-33.

[18] Response at 24.

[19] Univision Reply at 10.

[20] Univision cites Las Cruces TV Cable v. FCC, 645 F.2d 1041 (D.C. Cir. 1981), as support for that contention.

[21] Fedex Reply at 16-17.

[22] *Id.* at 18.

[23] *Id.* at 20.

[24] *Id.* at 19.

[25] *Id.* at 16, *citing* AT&T Earnings, 78 FCC 2d at 666 n.7.

[26] *Id.* at 15.

[27] Response at 33.

[28] Fedex Reply at 22-23.

[29] *AT & T* (Docket Nos. 16258, 15011), 9 FCC 2d 30, 88, 114 (1967); *accord* Concurring Opinion of Comm'r Nicholas Johnson, *id.* at 123; *AT & T* (Phase I of Docket No. 19129), 38 FCC 2d 213 (1972); *AT & T* (Docket No. 20376), 57 FCC 2d 960 (1976); AT&T (Docket No. 79-63), 86 FCC 2d 221 (1981).

[30] *See* FPC v. Tennessee Gas Co., 371 U.S. 145, 155 (1962); Wisconsin Elec. Power Co. v. FERC, 602 F.2d 452, 457 (D.C. Cir. 1979).

[31] Las Cruces TV Cable v. FCC, 645 F.2d 1041, *loc. cit.* (D.C. Cir. 1981) (*Las Cruces)* (citing, *e. g.*, Public Service Comm'n v. FPC, 329 F.2d 242, 250 (D.C. Cir.), *cert. denied*, 377 U.S. 963 (1964)).

[32] *Id.* at 1047.

[33] 602 F.2d 452 (D.C. Cir. 1979).

[34] In the interest of simplicity, excess revenues and interest have been calculated from August 1, 1984 rather than July 30, 1984, when Comsat's tariffs in purported compliance with the *Second Structure Order* became effective. The Common Carrier Bureau is delegated authority to make any adjustment in the refund amount that may be necessary to reflect the actual effective date of the tariffs. *See* n.46, *infra*.

[35] The Communications Act establishes a two year statute of limitations for reparations claims. 47 U.S.C. § 415.

[36] We do not, for example, foresee any circumstances that would warrant suspending enforcement of the present Part 65 refund procedures or that would enable carriers that are subject to those rules to present a credible claim that they did not expect full enforcement. In addition, the equitable considerations present here clearly distinguish this case from our treatment of AT&T in a series of orders addressing its tariffs and rate of return compliance. *See* AT&T Charges for Interstate Telephone Service, 51 FCC 2d 619 (1975); *recon. denied*, 53 FCC 2d 1073 (1975); *return prescribed* 57 FCC 2d 960 (1976); American Tel. & Tel. Co., Petition for Modification of Prescribed Rate of Return (CC Docket No. 79-63), 73 FCC 2d 689 (1979); and AT&T Charges for Interstate Service, 78 FCC 2d 661, 667 (1980). The factual circumstances present in the instant case are, again, a unique combination of factors -- this Commission's continued knowing acceptance of, and failure to investigate, explicitly excessive rates, and the surrounding economic conditions that would likely have justified a higher authorized return had Comsat sought one. Neither factor was present in the AT&T context. This Commission did not once permit facially excessive AT&T rates to take effect. Nor did it fail to investigate promptly AT&T's facially excessive rates. Moreover, in an order requiring AT&T to refund excessive earnings, we concluded that the economic and financial market conditions during the refund period were similar to those that the Commission had considered at the time of the rate of return prescription. AT&T Earnings on Interstate and Foreign Services During 1978, FCC 84-567 (released Dec. 11, 1984), 49 Fed. Reg. 49502, 49504-5 (Dec. 20, 1984), *recon.*, FCC 85-284 (released May 30, 1985), *aff' d sub nom.* New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. August 21, 1987).

[37] *See* , *e. g.*, Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234-35 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920, 976 (1981); Papago Tribal Util. Authority v. FERC, 628 F.2d 235, 239-41 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980). For example, had a Comsat customer filed a complaint under Section 208 of the Act during this period, equitable considerations would not have barred its consideration, particularly in light of the facially excessive rates proposed in these filings.

[38] New England Tel. & Tel. Co. v. FCC, No. 85-1087, slip op. at 18 (D.C. Cir. Aug. 21, 1987).

[39] *Id.*

[40] *See* 47 C.F.R. § 65.700 (1986).

[41] 99 FCC 2d at 1056.

[42] In American Telephone & Telegraph Co., 51 FCC 2d 619, 626, *aff' d sub nom.* Nader v. FCC, 520 F.2d 182, 204 n.25 (D.C. Cir. 1975).

[43] Communications Satellite Corporation, 56 FCC 2d 1101, 1173 (1975), *aff' d sub nom.* Comsat v. FCC, 611 F.2d 883 (1977).

[44] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 58 RR 2d 1647 (1985) (*Authorized Rates of Return), appeal pending*, AT&T v FCC, No. 85-1778 (D.C. Cir. May 21, 1987).

[45] Authorized Rates of Return, 58 RR 2d at 1649.

[46] As in Appendix C, from which these data are taken, the specified amounts for excess revenue and interest in 1985 and 1986 do not precisely agree with the total due to rounding. These amounts are subject to modification before final distribution to customers as may be necessary to correct arithmetical errors in, or make technical adjustments to, the data or calculations underlying them. We delegate to the Chief, Common Carrier Bureau, the authority to make such modifications.

[47] There is no reason to delay refunds owed to Comsat's end user customers, since these customers and their relative usage are easily identified. Such funds should be disbursed by Comsat prior to February 15, 1988.

[48] *See* American Tel. & Tel. Co., Docket No. 20639, 56 FCC 2d 821 (1975), modified, 67 FCC 2d 966 (1978), proceeding terminated, 90 FCC 2d 1233 (1982); American Tel. & Tel. Co. (Hawaii Transponder Case), 45 FCC 2d 252 (1974); Authorized Entities and Authorized Users, 4 FCC 2d 421, 434 (1966).

[49] International Competitive Carrier Policies, CC Docket No. 85-107, 59 Pike & Fischer R.R. 2d 283 (November 15, 1985).

[50] We note that the non-dominant international carriers were not classified as such by this Commission until well after the mid-point of the period involved.

[51] *See*, ITT World Communications Inc., 70 FCC 2d 1316, 1328-30 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-245

In the Matter of

Allocation Method for Unrouted Ship-to-Overseas INMARSAT Telex Traffic — RM-6013

NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1988; Released: May 20, 1988

By the Commission:

I. INTRODUCTION

1. We hereby give notice of a proposed Rule Making to develop mechanism for the allocation of unrouted[1] ship-to-overseas[2] telex [3] traffic transmitted over the space segment of the International Maritime Satellite Organization (INMARSAT).[4] Below, we briefly summarize the petition for Rule Making filed by MCI Communications Corporation (MCI) requesting that we adopt a policy requiring that unrouted ship-to-overseas telex traffic be distributed using a proportionate allocation method rather than the rotational method by which such traffic is currently allocated. We then describe the pleadings filed in response to the MCI petition. We next analyze the petition and pleadings. We tentatively conclude that we should adopt a proportionate allocation method by which unrouted ship-to-overseas telex traffic transiting the United States handled via the INMARSAT system should be distributed among participating carriers[5] in proportion to the volume of overseas-to-ship telex traffic transiting the United States each carrier handles via INMARSAT facilities. We also ask interested persons to comment on: (1) whether the allocation of unrouted ship-to-overseas telex traffic should be made proportionate to all shore-to-ship satellite telex traffic including United States originating telex traffic; (2) how often an adjustment of the carriers' proportionate shares of unrouted ship-to-overseas telex traffic should be made; and (3) whether there is any other unrouted ship-to-shore telex traffic which should be routed in accordance with the same proportionate allocation method.

II. THEMCI PETITION AND RELATED PLEADINGS

2. On June 25, 1987, MCI filed a petition for Rule Making, RM 6013, requesting that we adopt a policy which would replace Comsat's present rotational method of allocating unrouted ship-to-shore telex traffic among United States carriers with a proportionate allocation for distributing such traffic among those carriers. The MCI petition was placed on public notice on July 16, 1987. Under the current rotational allocation method for unrouted ship-to-overseas telex traffic, Comsat rotates the delivery of traffic to each of the United States participating carriers in a manner which results in each carrier receiving an approximately equal share of that traffic. MCI asserts that the current rotational allocation method establishes improper incentives for carriers because it gives no recognition to the volume of shore-ship traffic delivered by the participating carriers. According to MCI, this lack of recognition reduces the typical incentives for individual carriers to increase traffic levels and, consequently, competition is diminished.

3. MCI asserts that we should establish a linkage between the volume of telex traffic brought by a carrier from overseas points to INMARSAT equipped ships and the portion of the unrouted outbound overseas telex traffic from those ships allocated to the carrier. According to MCI, a proportionate allocation of traffic would encourage carriers to attempt to increase their INMARSAT traffic and would reward increases that occur.

4. TRT Telecommunications Corporation (TRT) and RCA Global Communications, Inc. (RCAG) filed statements supporting the MCI Rule Making on August 17, 1987. The Communications Satellite Corporation (Comsat) filed a statement supporting the petition for Rule Making on August 18, 1987. All three parties agree that unrouted ship-to-overseas telex traffic should be allocated among United States carriers in proportion to the volume of shore-to-ship traffic each such carrier delivers to ships at sea. RCAG finds MCI's argument for a proportionate allocation of unrouted ship-to-overseas telex traffic to be pro-competitive and reasonable. TRT expresses its agreement with MCI that a proportionate allocation procedure would reward those carriers which develop the market for shore-to-ship traffic by allocating to them a volume of unrouted ship-to-shore traffic more appropriately related to the amount of traffic their efforts have generated. TRT notes that, because the current rotational allocation system mechanically divides unrouted ship-to-overseas traffic among more carriers as the number of participating carriers increases, no incentives are produced for carriers to develop the market for INMARSAT traffic.

5. Comsat states that the current rotational allocation method is not working well because some participating carriers are more concerned about obtaining traffic without incurring marketing efforts rather than providing service to end users. Comsat asserts that the current additional allocation method subjects it to additional, needless administrative burdens because of the requirement that it interconnect with any carrier which delivers overseas traffic even if that carrier is unable to provide transit traffic in the return direction. Comsat asserts that the existing rotational allocation method is inequitable and engenders operation complexity, transactional costs and needless administrative burdens.

6. On September 1, 1987, MCI filed a reply to the pleadings of RCAG, TRT and Comsat. Noting that the statements filed by these parties unanimously supported its proposal, MCI urged that, pursuant to Section 1.405(d) of our Rules[6], 47 C.F.R. Section 1.405(d)(1986), we immediately adopt the proportionate allocation mechanism for unrouted ship-to-overseas telex traffic described in its petition for Rule Making.

7. On September 30, 1987, Graphnet, Inc. (Graphnet) submitted "Comments on Reply of MCI Communications Corporation" accompanied by a "Petition for Acceptance of Comments On Reply of MCI Communications Corporation."[7] In its comments, Graphnet submits that prior

to making any change in the present rotational allocation of unrouted ship-to-overseas telex traffic, the Commission must first give notice of the proposed modification and afford all interested parties an opportunity to comment on the proposed rules.

8. Graphnet notes that Section 553 of the Administrative Procedure Act, 47 U.S.C. Section 553 (1986) provides that notice and comment procedures are not required prior to adopting "interpretive rules, general statements of policy or rules of agency organization, procedures, or practices, or . . . when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest." Graphnet argues that none of the specified exemptions apply to the MCI petition for Rule Making and that no good cause exists for circumventing the Commission's normal procedure.

9. Graphnet asserts that the need for normal Rule Making procedures is also supported by the existence of substantial questions raised by the MCI proposal. According to Graphnet, these questions include: why is MCI's proposal limited only to unrouted ship-to-overseas traffic; how should a particular carrier's proportion of unrouted traffic be calculated; why is it more appropriate to base a carrier's proportion of unrouted traffic only on overseas-to-ship traffic rather than on total shore-to-ship traffic; and how often will the carrier traffic ratios be recalculated?

III. DISCUSSION

Background

10. The International Maritime Satellite Telecommunications Act (Maritime Satellite Act),[8] designates Comsat as the United States operating entity in INMARSAT. As such, Comsat is responsible for interconnecting contracting United States service providers with the INMARSAT system. At present, eight carriers have entered into interconnection agreements with Comsat for the purpose of providing telex service via INMARSAT space segment facilities.[9]

11. We initially addressed the operational arrangements by which Comsat interconnects with the United States service providers for extending INMARSAT satellite service within the United States and other areas in CC Docket No. 79-35.[10] In a Memorandum Opinion and Order in that docket released April 30, 1979[11], we addressed, *inter alia*, the questions concerning ship-to-shore traffic and unrouted ship-originated traffic. We found that the shipboard originators of both ship-to-U.S. and ship-to-overseas traffic should have unrestricted choice of the United States carriers that would transmit the traffic to its destination. With respect to unrouted ship-originated traffic, we found it to be unclear whether there would be a sufficient amount of such traffic to justify the additional operational and administrative expenses that would result from a Commission imposed distribution formula. We instead directed Comsat to handle any unrouted ship-originated traffic in a non-discriminatory fashion. We also noted that we would consider instituting proceedings to determine a method for the allocation of unrouted ship-originated traffic if a significant amount of such traffic should materialize.[12]

12. As is set forth in the petition for Rule Making and the pleadings relating thereto, Comsat instituted the current rotational allocation method for unrouted ship-to-overseas telex traffic among participating carriers. Under this method, unrouted ship-to-overseas telex traffic is distributed among participating carriers in a manner which results in all such carriers receiving approximately equal shares of such traffic. Each new carrier that enters into an interconnection agreement with Comsat automatically receives a share of this unrouted traffic.

13. The question of the appropriate allocation of unrouted ship-to-overseas telex traffic has more recently been addressed in connection with Comsat's application for authority to enter into an interconnection agreement with Graphnet to facilitate the exchange of traffic between ship earth stations and specified offshore and overseas land points, FCC File No. I-T-C-87-027. In response to this application, MCI's subsidiary, Western Union International, Inc. (WUI) filed a petition requesting that the authority granted to Comsat to interconnect with Graphnet be conditioned on the implementation of a proportionate allocation method for the distribution of unrouted ship-to-overseas traffic. Comsat filed comments supporting the grant of its application conditioned as requested by WUI. However, Graphnet opposed imposition of the WUI requested condition. Graphnet contended consideration of the issue of distribution of unrouted ship-to-overseas telex traffic involved all participating carriers, and was, therefore more appropriately considered in a Rule Making proceeding rather than in the application proceeding then before the Commission.

14. The Common Carrier Bureau released on March 6, 1987 Memorandum Opinion and Order[13] which indicated that the comments of WUI and Comsat raised serious questions regarding the allocation of unrouted ship-to-overseas traffic. The Order stated that it was well established that the volume of such traffic is increasing and that the current distribution method for that traffic is not sensitive to the volume of shore-to-ship traffic delivered by individual carriers. However, the Order agreed with Graphnet that consideration of this issue was beyond the scope of the application proceeding under consideration. It stated that this determination was without prejudice to WUI or any other entity filing a petition for Rule Making proposing changes made in the current allocation method for unrouted ship-to-overseas traffic.

The MCI Request for Immediate Adoption of a Rule Specifying a Proportionate Allocation of Unrouted Ship - to - Overseas Telex Traffic

15. We find that a rule altering the current distribution of unrouted ship-to-overseas telex traffic is not among the categories of rules that Section 553 of the Administrative Procedure Act permits us to implement without completing public notice and comment procedures. We also are unable to find good cause why the conduct of public notice and comment procedures is impracticable, unnecessary or contrary to the public interest. To the contrary, we believe that the questions raised by Graphnet in its comments are relevant to the question of what, if any, changes to the existing allocation method for unrouted ship-to-overseas telex traffic should be made and that these questions should be addressed in a notice and comment Rule Making proceeding. Therefore, we deny MCI's request that we immediately adopt a rule which specifies

MCI's prposed proportionate allocation method as the mechanism to be used for distribution of unrouted ship-to-overseas telex traffic among participating carriers.

The MCI Petition for Rule Making

16. We conclude on the basis of the record before us that MCI's petition for Rule Making should be granted to the extent of instituting a Rule Making proceeding to determine by what allocation method unrouted ship-to-overseas telex traffic should be distributed among participating carriers in the future. As noted earlier, we were unwilling in 1979 to specify an allocation method for such traffic because we did not know whether the volume of unrouted traffic which might develop would justify the additional administrative and operational expenses which might result from imposition of a Commission specified traffic allocation method.

17. In its statement in support of the MCI petition for Rule Making, Comsat indicates that during 1986 there were 550,999 minutes of ship-to-overseas telex traffic handled by it and the participating carriers. During the first five months of 1987, 265,741 minutes of ship-to-overseas telex traffic was handled by it and the carriers.[14] Apparently, the vast majority of this ship-to-overseas telex traffic is unrouted. Comsat indicates that, for the month of May 1987,[15] 49,720 minutes or 96.3 percent of the 51,653 minutes of ship-to-overseas telex traffic handled were unrouted. Of the 3.7 percent (1,933 minutes) of this traffic for which the senders specified the carrier to handle the traffic, 3.5 percent (1,792 minutes) were routed via ITTWC, RCAG and TRT, the three carriers which also provide high frequency radio telegram service to ships.

18. The foregoing leads us to conclude that the volume of unrouted ship-to-overseas telex traffic which now apparently exists is sufficient to warrant the institution of a Rule Making proceeding to determine by what allocation method such traffic in the future should be distributed among carriers interconnecting with Comsat. We would also note that the concern we expressed in 1979 over the possible additional operational and administration costs which might stem from the implementation of an alternate Commission imposed traffic allocation formula are somewhat ameliorated by the fact that Comsat's support for MCI's proposed proportionate traffic allocation method is based in part on Comsat's desire to avoid the operational complexity, transactional costs and unnecessary administrative burdens of the existing rotational traffic allocation mechanism.

19. We tentatively conclude that, in the future, unrouted ship-to-overseas telex traffic transiting the United States handled via the INMARSAT space segment should be distributed among participating carriers in proportion to the volume of overseas-to-ship telex traffic transiting the United States each carrier handles via the INMARSAT space segment. It is our policy to encourage competition in the provision of telecommunications services wherever such competition is possible and will serve the public interest. Shipboard customers originating ship-to-overseas telex traffic transiting the United States have the ability to choose among United States carriers on the basis of competitive considerations. However, the fact that approximately 96 percent of this traffic is currently unrouted clearly indicates that the shipboard originators of this traffic do not avail themselves of the choice among competing United States carriers available to them.[16]

20. As is demonstrated in the previous discussion of the MCI petition and the statements supporting that petition, the current rotational allocation method for distributing unrouted ship-to-overseas telex traffic contains no mechanism which relates the distribution of that traffic to the competitive efforts of the individual participating carriers. The signing of an interconnection agreement with Comsat for the provision of telex service alone entitles a carrier to share equally in the distribution of unrouted ship-to-overseas telex traffic. MCI and the parties supporting its petition correctly observe that this arrangement provides no incentive for carriers to increase their competitive efforts.

21. Adoption of MCI's proposal to distribute unrouted ship-to-overseas traffic among participating carriers in proportion to the overseas-to-ship telex traffic each such carrier handles would make each carrier's competitive success in the marketplace a major factor in the determination of the volume of unrouted ship-to-overseas telex traffic each carrier would receive. As a carrier increases its share of overseas-to-ship telex traffic through its competitive efforts, its share of the unrouted ship-to-overseas telex traffic would increase. We agree with MCI and the parties supporting its petition that the proportionate distribution of unrouted ship-to-overseas telex traffic in this manner will reward the carriers' success in the marketplace and, therefore, will provide an incentive for the carriers to increase their competitive efforts. Such a result is consistent with our pro-competitive policy. For this reason, we tentatively conclude that, in the future, unrouted ship-to-overseas telex traffic transiting the United States handled via the INMARSAT space segment should be distributed among participating carriers in proportion to the volume of overseas-to-ship telex traffic transiting the United States each carrier handles via the INMARSAT space segment.

22. We also seek comment on whether the distribution of unrouted ship-to-overseas telex traffic should be in proportion to total shore-to-ship telex traffic handled by each participating carrier. Total shore-to-ship telex traffic would include U.S. originating-to-ship telex traffic as well and overseas-to-ship telex traffic transiting the United States. In order to facilitate our consideration of this issue, we request that Comsat provide in its comments responding to this Notice of Proposed Rule Making, the volume of U.S. originated-to-ship telex traffic for the same periods and in the same format and detail as it provided the ship-to-overseas traffic in its statement supporting the MCI petition.

23. We further request that the parties indicate whether there is any other unrouted telex traffic handled by United States carriers via the INMARSAT system. If there is additional unrouted telex traffic, we request that the parties address the question of whether such unrouted traffic should also be distributed on a proportionate basis. Finally, we request the parties to address the question of how often the share of unrouted ship-to-overseas telex traffic of each participating carrier should be recalculated.

24. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206 (a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates with the Commission (1) releases the text

of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202 (f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

25. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

26. We have analyzed the proposal contained in this notice with respect to the Paperwork Reduction Act of 1980, 20 U.S.C. Sections 1221-1223, and have found that it imposes no new or modified information collection requirement on the public.

27. We have determined that Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 605, does not apply to this Rule Making proceeding because if promulgated it would not have a significant economic impact on a substantial number of small entities.

28. Accordingly, a Rule Making proceeding on the captioned matter is instituted, under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Section 504(b)(6) of the International Maritime Satellite Telecommunications Act, 47 U.S.C. 752(b)(6), Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, and Sections 1.407 and 1.411 of the Commission's Rules, 47 C.F.R. Sections 1.407 and 1.411 (1986), to determine the appropriate mechanism for allocating unrouted INMARSAT telex traffic among interconnecting U.S. carriers.

29. IT IS FURTHER ORDERED that interested parties may file comments on matter raised in this notice by **July 11, 1988,** and reply comments by **July 26, 1988** under procedures set out in Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. Section 1.419, an original and five copies of all statements, briefs, comments and reply comments shall be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. All such filings will be available for public inspection in the docket reference room at the Commission's Washington, D.C. offices. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration ideas and information not contained in comments, provided that such information or a writing indicating its nature and/or source is placed in the public file, or is otherwise publicly available, and provided that the Commission's reliance on such information is noted in the Order.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] In general, the term "unrouted traffic" refers to traffic for which a carrier to handle the traffic has not been designated by the customer sending the traffic.

[2] Ship-to-Overseas telex traffic is telex traffic sent via the INMARSAT space segment to an earth station in the United States and thence via the facilities of a United States carrier to the overseas destination of the traffic. Unrouted ship-to-overseas telex traffic is traffic for which the sender has not specified a United States carrier to handle the traffic between the United States earth station and the overseas destination.

[3] Telex refers to a customer-to-customerswitched record service using telegraph-grade connecting circuits and characterized by a two-way communicationscapacity.

[4] INMARSAT is an international organization comprised of 54 member nations. It was created to establish an international maritime satellite system to improve maritime communications for distress and safety of life at sea, public correspondence, radiodeterminationand ship management.

[5] As used herein, a participating carrier is a carrier which has entered into an interconnection agreement with Comsat for the handling of telex traffic via the INMARSAT satellite system.

[6] Section 1.405(d) provides:

> The Commission may act on a petition for Rule Making at any time after the deadline for the filing of replies to statements in support of or in opposition to the petition. Statements in support of or in opposition to a petition for Rule Making, and replies thereto, shall not be filed after Commission action.

[7] Section 1.405 of our Rules, 47 C.F.R. Section 1.405 (1986) provides for the filing of only statements in support or in opposition to a petition for Rule Making and replies to such statements. Section 1.405(c) states that:

> No additional pleadings may be filed unless specifically requested by the Commission or authorized by it.
>
> Graphnet states that its comments address MCI's "extraordinary request" that the Commission abandon its normal notice and public comments procedures and immediately adopt a new rule. Graphnet asserts that, since MCI did not raise its request for immediate adoption of a rule specifying MCI's proposed proportionate allocation method as the mechanism for distributing unrouted ship-to-overseas traffic among participating carriers until its reply comments, Graphnet did not have the opportunity to address this MCI proposal in the normal pleadings associated with

petitions for Rule Making. Therefore, Graphnet urges us to accept its Comments. We grant Graphnet's request and accept its comments for filing and consideration in this proceeding.

[8] 47 U.S.C. Sections 751-757 (1986).

[9] These eight carriers are: Consortium Communications International, Inc. (CCI); FTC Communications, Inc. (FTCC); Graphnet; ITT World Communications Inc. (ITTWC); MCI/WUI; RCAG; TRT; and The Western Union Telegraph Company (WUTC).

[10] Implementation of requirements of the International Maritime Satellite Telecommunications Act.

[11] International Maritime Satellite System, 71 FCC 2d 1069 (1979).

[12] 71 FCC 2d at pp. 1081-82.

[13] Memorandum Opinion and Order, Comsat International Extension of Lines, 2 FCC Rcd 1461 (1987).

[14] Comsat also indicates that during 1986, 412,208 minutes of telex traffic between overseas points and ships was handled by Comsat and the carriers with which it interconnects. During the first five months of 1987, these entities handled 220,925 minutes of such traffic.

[15] May 1987 is the latest period for which Comsat had reports from the interconnecting carriers at the time Comsat filed its statement in this proceeding.

[16][17] In its statement supporting the MCI petition, Comsat suggests that the fact that many ships utilizing the INMARSAT system are foreign registered and are from countries where competition for telecommunications service does not exist may be among the reasons why shipboard originators of ship-to-overseas telex traffic do not exercise their opportunity to designate a United States carrier to handle their traffic.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Tariff F.C.C. No. 68

Transmittal No. 1613

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1988; Released: March 9, 1988

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. Southwestern Bell Telephone Company (Southwestern Bell) filed Transmittal No. 1613 on December 11, 1987, to implement an Order adopted by the Public Utility Commission of Texas (Texas PUC) requiring the blocking of interLATA 976 Service calls for which the 976 Service information provider (IP) is unable to collect. American Telephone and Telegraph Company (AT&T) filed a petition to suspend and investigate the tariff[1] and Southwestern Bell filed a reply.[2] New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed comments in support of the tariff, [3] which is scheduled to become effective on March 10, 1988.

2. Providers of 976 Service charge a specified fee (sponsor fee) to originating end users for the use of the IP's information service. The billing of the sponsor fee is generally done by the local exchange carrier (LEC) which adds to that fee the LEC and interexchange carrier (IC) charges for the transmission of the call. In informal discussions with Commission staff, Southwestern Bell has indicated that, on a monthly basis, it remits the total billings for the sponsor fees to the IP after deducting for the prior month's uncollectibles and separately charging for its billing service.

3. Southwestern Bell previously filed an application to amend its intrastate 976 Service tariff with the Texas PUC. Southwestern Bell states that the application sought resolution of a problem with uncollectible intrastate 976 Service charges. During hearings conducted by the Texas PUC, Southwestern Bell apparently testified that it was unable to restrict its blocking to intrastate interLATA calls, as it cannot distinguish interLATA calls that are interstate from those that are intrastate. Consequently, the Texas PUC ordered Southwestern Bell to amend both its intrastate and interstate access tariffs to specify that *all* interLATA 976 Service calls will be blocked. Southwestern Bell Reply at n.1. Southwestern Bell claims that such blocking is appropriate as it does not have a means to bill interLATA calls and that, as a result, 976 Service IPs do not receive all of the revenues to which they are entitled. Southwestern Bell Description and Justification (D&J) at 1. Transmittal 1613 would effectuate the interstate blocking ordered by the Texas PUC.

II. PLEADINGS

4. AT&T contends that Southwestern Bell is denying access to it and other ICs "on the basis of its inability to collect a charge that relates, not to the transmission of the call itself, but rather to the information service provided by [Southwestern Bell's 976 Service IP] customer." AT&T Petition at 2. AT&T argues that by blocking certain 976 Service calls, "Southwestern Bell would condition its provision of an essential access service on its ability to bill the caller, on behalf of the [976 Service IP]." *Id.* at 5. AT&T maintains that Southwestern Bell's proposed limitation on the provision of terminating access "is an unreasonable condition on the provision of interstate access under Section 201(b) of the [Communications] Act." *Id.* at 9.

5. In its reply, Southwestern Bell fails to address AT&T's contention that Transmittal 1613 imposes an unreasonable condition on the provision of access. Rather, Southwestern Bell asserts that the determining factor is an equitable one. It claims that failure to block uncollectible 976 Service calls is inequitable because AT&T presently receives a "windfall" by "being paid for the transmission of the 976 call even though [it] knows when it carries the call that the 976 sponsor has no means of being paid for providing [an] information service which stimulated the call in the first place." Southwestern Bell Reply at 2.

III. DISCUSSION

6. Access is not an optional service. The Commission has long required all local exchange carriers to interconnect with interexchange carriers in order to originate or terminate interstate communications.[4] Any local exchange carrier that attempts to block any interstate transmissions to or from any interexchange carrier accordingly has a heavy burden to demonstrate that such action is consistent with the interconnection obligations the Commission imposed. Southwestern Bell has not met that burden.

7. Southwestern Bell does not claim that it is blocking the traffic in order to assist in the collection of interstate access charges from interexchange carriers. It does not even claim that it is blocking traffic to assist AT&T or any other interexchange carrier to collect charges for telecommunications services. The blocking is apparently designed to assist information service providers to collect the charges for their services or to assist Southwestern Bell in providing a collection service for information service providers. We agree with AT&T's contention that assisting Southwestern Bell's unregulated billing and collection service is not an adequate justification for failing to perform Southwestern Bell's basic interconnection obligation.

8. Indeed, this Bureau has previously held that third party compensation problems that do relate to interstate telecommunications services do not justify the blocking of interstate traffic. *See* Blocking *Order).* [5] Thus, Southwestern Bell may not deny access because it is unable to collect a charge that relates not to the transmission of the call but to the information service provided by its customer at the terminating end. Its attempt to condition the provision of access on the resolution of a third party's billing problems also constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

9. Moreover, Southwestern Bell's argument that equity requires blocking of interstate calls because AT&T otherwise would receive a "windfall" is mistaken. AT&T must

receive compensation for service rendered, namely, the provision of interstate transmission. Such compensation does not constitute a "windfall."

10. Since we have concluded that Southwestern Bell's proposed blocking of interstate 976 Service traffic is a patent violation of the Specialized Common Carrier interconnection order and Section 201(b) of the Act, we reject Southwestern Bell's transmittal. Our decision to reject this transmittal makes AT&T's petition for suspension and investigation moot.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1613, IS REJECTED.

12. IT IS FURTHER ORDERED that the petition to suspend and investigate filed by American Telephone and Telegraph Company IS DISMISSED as moot.

13. IT IS FURTHER ORDERED that the motion to file comments submitted by the NYNEX Telephone Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition of American Telephone and Telegraph Company To Suspend and Investigate, filed Dec. 28, 1987 (AT&T Petition).

[2] Reply Comments of Southwestern Bell Telephone Company, filed Jan. 11, 1988 (Southwestern Bell Reply).

[3] Comments of NYNEX Telephone Companies, filed Jan. 13, 1988 (NYNEX Comments). NYNEX also filed a Motion To File Comments which requested that we accept its late-filed comments. Inasmuch as the Commission's Rules do not provide for the filing of comments in support of proposed tariff revisions, we will deny NYNEX's motion and dismiss its pleading.

[4] *See* Specialized Common Carrier Services, 29 FCC 2d 870, 940 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See also* Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *aff'd* sub nom. Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

[5] In that case, Tex-Net, Inc., sought a declaratory ruling that Commission policy prohibited primary and secondary LECs from blocking originating or terminating Feature Group B (FGB) interstate traffic due to, among other things, compensation problems associated with secondary LECs. The Common Carrier Bureau granted the petition and found that concerns about compensation do not justify the blocking of interstate FGB traffic. Blocking Order at paras. 8-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 20, 1988

COMMON CARRIER BUREAU OPENS FILING PERIOD FOR MULTICHANNEL MULTIPOINT DISTRIBUTION SERVICE APPLICATIONS

In accordance with Section 21.901(d)(4) of the Commission's Rules, 47 C.F.R. §21.901(d)(4), NOTICE is hereby given that commencing April 20, 1988 applications for the Multichannel Multipoint Distribution Service (MMDS), E-channel and F-channel group frequencies, may be submitted for filing for any location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications filed must comply with the location restrictions contained in this *Notice*. We do not anticipate granting any waivers of this location requirement. Applications that fail to comply with this requirement will be dismissed as unacceptable for filing. In addition, applications submitted for filing must comply with the filing requirements of Parts 1 and 21 of the Commission's Rules, and Public Notices, released January 15, 1988, "Clarification of Part 21 Domestic Public Fixed Radio Services Application Forms and Other Procedures" (DA 87-1696, Report No. 1266, released January 15, 1988) and "Clarification of Part 21 Domestic Public Fixed Radio Service Filing Fee Requirements and Application Form Use" (DA 87-1695, Report No. 1265, released January 15, 1988). Applicants are reminded that many of the rules applicable to eligibility criteria and permissible service, filing, and licensing requirements pursuant to Part 21 of the Rules have been revised. *See Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713 (1987) (*Part 21 Revision Order)* and *Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service*, 2 FCC Rcd 4251 (1987) (*MDS Status Election Order).*

Prospective MMDS applicants are advised of the following:

1. *Filing Date*. MMDS applications will be accepted for filing on April 20, 1988, and thereafter. This filing period will remain open until further notice by the Commission.

2. *Service Areas*. (A) *Statistical Areas*. Applicants must specify the proposed service area in Item number 5 (j) of FCC Form 435. In doing so, applicants should consult the list of classifications of the nation's statistical areas compiled by the Office of Management and Budget, as revised on June 30, 1983. This list refers to certain identified geographic areas as either a Metropolitan Statistical Area (MSA), or Consolidated Metropolitan Statistical Area (CMSA), or New England County Metropolitan Area (NECMA). *See Amendment of Parts 2, 21, 74 and 94 of the Commission Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1263 n.43 (1983) (*MMDS Allocation Order).* Applications filed must be for a location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications that fail to comply with the location requirements of this *Notice* will be dismissed as unacceptable for filing. In particular, those applicants proposing to locate transmitters in or within 15 miles of the border of an MSA, CMSA, or NECMA should list in Item number 5 (j) the *first* named city in the statistical area title as provided in OMB's list. Applications proposing to serve either an MSA, CMSA, or NECMA will be considered together, in accordance with the provisions of Section 21.901(d)(5). Each application will be entitled to comparative consideration or to be included in a lottery in only one such service area. Each applicant will be allowed to file *only* a single application for either the E-channel or F-channel group frequencies in each statistical area. *See* Section 21.901(d)(2).

(B) *Non - Statistical Areas*. In addition to those service areas provided in the OMB listing of MSAs, CMSAs, and NECMAs, applications may be filed for a service area not identified by OMB as either an MSA, CMSA, or NECMA. Applications filed must be for a location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications that fail to comply with the location requirements of this *Notice* will be dismissed as unacceptable for filing. Applicants must provide in Item number 5(j) of FCC Form 435 the name of the *primary service area*. Issues of mutual exclusivity for applications not proposing to serve either an MSA, CMSA, or NECMA will be resolved using Part 21 rules other than Section 21.901(d)(5). Each applicant will be allowed to file *only* a single application for either the E-channel or F-channel group frequencies in each area. *See* Section 21.901(d)(2).

Failure to designate the service area in Item number 5(j) of FCC Form 435, in accordance with the above-described procedure, may result in the dismissal of the application as unacceptable for filing.

The OMB list of MSAs, CMSAs, and NECMAs is available for review in the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. 20554, or may be purchased from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. The title of the document is Metropolitan Statistical Areas, Order PB 832 18891. The telephone number of NTIS is (703) 487-4650. In addition, a list of currently pending MMDS applications is also available for inspection in the Domestic Facilities Division Public Reference Room. The Reference Room is open to the public Monday - Thurs-

day between the hours of 8:30-12:30 and 1:30-3:00. Inspection inquiries may be directed to James Yancey of our staff at (202) 634-1858.

3. *Cut - off Date*. The last date for filing conflicting (mutually exclusive) applications for comparative consideration or inclusion in a random selection process will be determined by procedures set forth in Section 21.31 of the Rules.

4. *Permissible Service Operations*. Pursuant to Section 21.900 of the Rules, MMDS applicants may provide service on either a common carrier or a non-common carrier basis. An applicant must specify at Item 2(a) of FCC Form 435 whether it intends to operate as a common carrier (cc) or as a non-common carrier (ncc). Applicants who elect non-common carrier status will be subject to the Commission's Part 21 Rules, and to the general provisions of Title III of the Communications Act of 1934, as amended, applicable to persons applying for microwave radio station authorizations. Applicants who elect common carrier status will be subject to the Commission's Part 21 Rules, to the provisions of Title II of the Communications Act (including the Commission's non-dominant carrier policies), and to the provisions of Title III of the Act applicable to persons applying for microwave radio station authorizations.

5. *Acceptable for filing*. In order to be acceptable for filing, an application must be complete with respect to questions, informational showings, execution, or other matters of a formal character and substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements. Applications that fail to comply with these requirements will be considered defective and may be subject to dismissal, unless accompanied by a request for waiver of (or request as an exception to), in whole or in part, any specific rule, regulation, or requirement with which the application is in conflict. *See* Section 21.20 of the Rules; s *ee also* Section 21.13 of the Rules. Only applications that are in a condition acceptable for filing will be included in a random selection process. *See* Sections 21.31 and 21.33 of the Rules. Applicants are advised that "lead" applications will not be accepted. A separate FCC Form 435 must be filed for each service area along with the required exhibits. Cross-reference to "lead" applications will not be considered sufficient, and may result in the dismissal of the associated application as unacceptable for filing.

6. *Interference Studies*. At the time of filing, applicants must submit the following interference studies:

a. A written analysis demonstrating non-interference with all cochannel and adjacent channel Instructional Television Fixed Service (ITFS) licensees, permittees, or applicants with transmitters located within 50 miles of the applicant's transmitter, or a statement from the ITFS licensee, permittee, or applicant that it will accept whatever interference occurs. *See* Section 21.901(d)(1).

b. A written analysis demonstrating that the facility to be constructed will not cause harmful interference to existing cochannel or adjacent channel ITFS receive sites within 50 miles of the transmitter, or alternatively, must submit a statement from the ITFS licensee that the interference is acceptable. *See* Section 21.902(i).

c. A written analysis demonstrating non-interference with all cochannel and adjacent channel MMDS licensees, permittees, or applicants with applications pending on April 19, 1988 (including tentative selectees) with transmitters located or proposed to be located within 50 miles of the MMDS applicant's proposed transmitter. *See* Section 21.902.

7. *Site Availability*. Section 21.15(a) specifies that applicants proposing a new station location indicate whether the site is owned. If it is not owned, its availability for the proposed microwave radio station shall be demonstrated. Under ordinary circumstances, this requirement will be satisfied if the site is under lease or under written option to buy or lease. 47 C.F.R. §21.15 (a). MMDS applicants should note that, at the time of filing, it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. Subsequently, applicants chosen as tentative selectees in our random selection process must submit concrete evidence of site availability after their lottery selection. At that time, the submission of a lease or lease option agreement will satisfy that requirement. MMDS applicants not subject to our random selection process must submit a lease or lease option agreement as concrete evidence of site availability upon request. In addition, Section 21.40(b) provides that no extensions of time to construct a facility will be granted based upon lack of site availability.

8. *Financial Certification*. Section 21.17, as revised, requires that each application for a new license shall contain a certification that the applicant has or will have the financial ability to meet the expected costs of constructing the proposed facilities within the time allowed and the estimated operating expenses for a period of twelve months. Consequently, all applications shall include a financial certification statement (Exhibit T of FCC Form 435) in which the applicant certifies that it has, or has reasonable assurance that it will have, the ability to meet the expected cost of constructing the facilities within the construction period and the estimated operating expenses for twelve months. Applicants are reminded that Section 21.40(b) provides that construction periods may not be extended for delays caused by lack of financing.

9. *Preferences*. Two types of preferences may be awarded to MMDS applicants: (a) minority preferences, and (b) diversity preferences. Applicants who may be eligible to claim lottery preferences are required to submit a certification of preference for all applications for which a preference is being claimed. The factors used to determine if an applicant qualifies for either type of preference are explained in Section V of FCC Form 346, with one exception. Item 4, Section V, page 2 (FCC Form 346, page 7) does not reflect the fact that the Commission added MDS stations to the definition of the term "medium of mass communication". Thus, in determining eligibility for a diversity preference, applicants should consider their ownership interest in either single channel or multichannel MDS station licenses or construction permits in addition to the media listed on page 2 of Section V. Those media are a daily newspaper; a license or construction permit for: a television station, including low power and television translator station; an AM or FM radio broadcast station; broadcast satellite transponder; or a cable television system.

For purposes of item 5 on page 2 of Section V (Form FCC 346, page 7) the service area of an MDS station is defined in Section 21.902(d) of the Commission's Rules. *See* Section 1.824 of the Rules, and *Random Selection Lotteries*, 93 FCC 2d 952 (1983). Such certifications must accompany the application at the time of filing. An applicant filing multiple MMDS applications may submit a single certification of preference (an original and a duplicate) if it is claiming the same preference for all its applications. If an applicant is claiming different preferences for its applications, it should submit a separate certification of preference (original and duplicate) for each set of applications for which it is claiming the same preferences.

10. *Amendments*. Applicants are requested not to submit any amendments before their applications have appeared on Public Notice as accepted for filing, unless asked to do so by the Commission's staff. Amendments should include the official FCC file numbers assigned to those applications. File numbers may be obtained from the Public Notices listing applications as accepted for filing. Sections 21.23 and 21.29 provide requirements for filing amendments to applications.

11. *Filing Fees*. Applicants are required to submit a filing fee of $135.00 per application (FCC Form 435), pursuant to Section 1.1105. *See also* "Clarification of Part 21 Domestic Public Fixed Radio Services Filing Fee Requirements and Application Form Use" (DA 87-1695, Report No. 1265, released January 15, 1988).

12. *Inspection and Copying*. Applications will not be available for inspection and copying before they appear on Public Notice as accepted for filing. Copies of applications must be requested for public record duplication from the applicants or from the Commission's contractor, ITS, Inc. Suite 140, 2100 M Street, NW, Washington, DC 20037, (202) 857-3800.

For further information concerning this Public Notice, contact Theodore Waddell, or Charles Gratch of our staff at (202) 634-1706. Inspection questions may be directed to James Yancey of our staff at (202) 634-1858.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Policy Regarding
Terrain Shielding in the Evaluation
of Television Translator, Television
Booster and Low Power Television
Applications

POLICY STATEMENT

Adopted: April 21, 1988; Released: April 25, 1988

By the Commission:

INTRODUCTION

1. The Commission herein revisits its policy regarding its treatment of the effects of terrain on propagation in the Low Power Television Service (LPTV). This action responds to our concern that some consideration of terrain shielding in the evaluation of television translator, television booster and LPTV applications is essential to the further authorization of service in many communities. Circumstances previously prohibiting any such consideration have changed. Accordingly, although we do not find that the public interest would be best served by incorporating considerations of terrain shielding into regular processing procedures at this time, the Commission will now grant waivers of its LPTV application acceptance standards concerning interference protection, when such requests are supported by either terrain studies or, alternatively, the assent to such grants by stations predicted to receive interference from proposed facilities, together with a less rigorous terrain showing. This *Policy Statement* sets forth general guidelines, on when we will consider terrain shielding requests, and provides general guidance for the submission of such requests.

BACKGROUND

2. The Commission's experience and concerns with accounting for the effects of terrain on signal propagation in the assignment of television translator stations provide an understanding of both how it could impede the efficiency of application processing and why we must limit the applicability of its consideration at this time. During the years before the Low Power Television Service was created, interference protection studies on television translator applications depended largely on engineering judgment, where terrain shielding played a major role. In evaluating the likelihood of interference from proposed facilities to nearby stations, the Commission staff reviewed topographic maps and terrain profiles submitted by applicants. Decisions were sometimes made on the basis of an assent by stations potentially affected by the grant of the application, with the understanding that the applicant would resolve any interference problems. These processing procedures were then feasible and worked effectively because the Commission dealt with relatively small backlogs of applications, the applications rarely were mutually exclusive, and most proposals were for service in areas of rugged terrain familiar to the applicants. Thousands of television translator stations were authorized in this manner and, generally, have operated without causing interference.

3. By the time the LPTV rules were adopted in 1982, the processing situation had changed drastically. The Commission then faced a backlog of more than 5,000 applications proposing translator and LPTV service throughout the country, and it was apparent that many of these applications were mutually exclusive. These circumstances prompted the Commission to conclude in the LPTV proceeding that it could no longer consider terrain shielding in the authorization process, where it stated in pertinent part:

> We believe that the overwhelming argument is presented by our experience with interim applications. It is far beyond our staff capacity to evaluate individually thousands of terrain shielding claims . . . .
>
> *[Low Power Television Report and Order,* 51 RR 2d 476, 495 (1982).]
>
> There is no universally accepted method of predicting the effects of terrain shielding. It would be beyond the scope of this proceeding to adopt a general terrain correction factor, even if we had sufficient information to enable us to do so. Under these circumstances, any attempt to allow for terrain shielding would embroil us in disputes that may not be susceptible to resolution by accepted standards and would therefore frustrate our efforts to expedite grant of low power licenses.
>
> *[Reconsideration of LPTV Report and Order,* 53 RR 2d 1267, 1274 (1983).]

Since then, and for the same reasons, the Commission has repeatedly declined to consider terrain shielding in the evaluation of television translator and low power television applications. *See Tel Radio Communications Properties, Inc.*, FCC 85-327, released June 27, 1985; *Kennebec Valley Television (Channel 3, Augusta, Maine),* 60 RR 2d 104, 105 (1986) (and authorities cited therein); *Kennebec Valley Television (Channel 12, Rutland, Vermont),* 60 RR 2d 107 (1986).

4. Efficient and systematic processing of the more than 30,000 applications filed in the service has necessitated strict adherence to our LPTV interference protection standards (47 C.F.R. 74.705, 74.707 and 74.709). These standards, in effect, prohibit the overlap of particular field strength contours, where contour locations are predicted from station engineering parameters and the Commission's signal propagation curves (47 C.F.R. 73.699). The standards in Section 74.707 of the rules also define mutual exclusivity among pending applications. In order to verify compliance with the standards and to determine which applications are mutually exclusive, the Commission staff generally relies on computer routines that make thousands

of calculations for each application studied. These routines compute antenna height above average terrain (HAAT) in pertinent directions and utilize HAAT in predictions of contour locations. The HAAT is the antenna height above the average terrain elevation between 3.2 to 16.1 kilometers (2 - 10 miles) from the antenna site. Except for HAAT, the effects of terrain cannot be incorporated into these routines until we adopt standard prediction methods, and we are not yet prepared to do so. Therefore, the evaluation of terrain shielding claims in LPTV application studies would involve the use of nonroutine, and possibly lengthy, engineering analysis.

5. Deviation from normal processing procedures delays the final disposition of an application. The adverse impact on expeditious processing is magnified when groups of mutually exclusive applications are involved, since delays in the processing of one application in the group, delay action on the others. Until recently, the majority of the applications filed in the service have been mutually exclusive with other applications proposing operation in the same or nearby communities. In many cases, those applications, in turn, have been mutually exclusive with yet other applications, and so on. In this manner, hundreds of applications have been linked in "daisy chains" involving many channels and communities spread over distances of hundreds of miles. Even under normal procedures, the processing of such groups of applications is very time consuming. For instance, whenever one or more defective applications in the group is dismissed, a lottery involving the group cannot take place until the time has passed for appeals of the staff action and all appeals have been resolved. Had terrain shielding been involved in determinations of mutual exclusivity, processing would have been brought to a near halt.

DISCUSSION AND REVISED POLICY

6. Despite the positive effect it has had on our ability to process applications expeditiously, we are mindful that our policy on terrain shielding has frustrated well-intentioned efforts to obtain additional or improved television reception, particularly in western mountainous areas where service is provided primarily by translators. We are aware that without consideration of terrain, it has been difficult to file acceptable applications in some areas. Many applications have been rejected because of predicted interference to a nearby station where, in reality, terrain obstructions may have prevented interference. Because of these concerns and our wish to authorize desired service wherever possible, we have looked toward the time when changing circumstances would permit us to pursue a more flexible terrain policy.

7. Circumstances have changed considerably since we received 25,000 LPTV and translator applications in March of 1984. First, the application backlog, which reached a peak of 37,000, has been reduced to fewer than 4,000 applications. Second, we have recently observed favorable changes in application filing patterns. Last summer, following a three-year filing freeze, we opened the first nationwide application "filing window," in which only 1,350 applications were filed. *Report and Order in the Low Power Television / Television Translator Service (Filing Window II)*, 2 FCC Rcd 1278 (1987). Significantly, nearly 500 of these applications were not mutually exclusive with other applications, and more than 400 of these have already been granted. Moreover, a relatively low percentage of the window applications are mutually exclusive, and these are not configured in long and complicated daisy chains. These factors are enabling much quicker authorization of service and are permitting actions to be taken on many applications without delaying the processing of others. While we wish to be cautious, it appears that our recently revised LPTV window procedures and the institution of filing fees have resulted in a reduction in incoming applications. Finally, the implementation of the LPTV service is now well underway. More than 3,000 construction permits have been granted since the service began, and the number of operating LPTV stations has been increasing steadily.

8. As a result of these changes, the Commission can give limited consideration to terrain shielding in the LPTV service. We cannot, at this time, propose standards for incorporating shielding into regular processing procedures. However, we will consider, on a case-by-case basis, requests for waiver of Sections 74.705 and 74.707 of our application acceptance standards, on the grounds of terrain shielding. Waivers must be secured in cases where proposed new or changed facilities would be predicted to cause prohibited interference. In order to be considered, waiver requests must be supported by a demonstration that the proposed facility would not be expected to interfere at the protected contour of all potentially affected stations, existing and proposed, because of the intervening terrain. An applicant may also submit the written assent to the grant of the waiver by all licensees, permittees and applicants of potentially affected stations. If the necessary assent is obtained, the demonstration may be less rigorous than otherwise expected. Potentially affected stations will include authorized full-service television, low power television and television translator stations, and those proposed in earlier filed LPTV or translator applications that are cut-off from further competing applications. As further discussed in paras. 10 and 11, *infra*, the supporting documentation generally should include a graphic description of the terrain obstructions (terrain profiles). However, in cases where the assent of affected stations has been demonstrated, our determination to grant the waiver may rely less on terrain analysis.

9. At this time, we must limit the scope of terrain waivers because we are uncertain about the administrative resource impact of specialized manual studies, and because we want to avoid situations where lengthy analysis of certain applications delays the processing of other related applications significantly. We do not know how many terrain shielding claims will be submitted, nor how much time, on average, will be involved in evaluating each case. Accordingly, we will consider terrain shielding waivers only in connection with the acceptance of applications, i.e., whether television translator, booster or LPTV applications should be returned because of predicted interference to facilities previously proposed or authorized. We will not consider terrain shielding in determining mutual exclusivity among applications. We will further limit its consideration to those applications which, under normal processing standards and methods, are not found to be mutually exclusive with one or more applications. Requests for waivers and supporting documentation must be submitted with applications when filed. Because this is an acceptability criterion, we will not consider terrain-related issues raised for the first time in petitions for reconsideration or applications for review of staff actions. Our revised policy on terrain shielding will apply only to

applications filed on or after the date on which it takes effect. Finally, our computer data base is not able to reflect any approved waivers of the acceptance standards based on terrain shielding. Therefore, applicants seeking waivers based on terrain shielding must make the required showing in each case and cannot incorporate by reference any earlier waiver.

10. We next discuss our general disposition on terrain-waiver submissions, including the information the Commission will need from applicants to evaluate claims of noninterference. The expressed assent to the grant of the waiver by all potentially affected stations would weigh heavily in our determinations and would obviate total reliance on terrain studies and permit more expeditious handling. In that event, we will not expect applicants to provide detailed terrain profiles, although we will need some graphic depiction of the terrain in all cases. In assenting to a waiver, a potentially affected station licensee would merely concur that interference from a proposed facility would be unlikely, and it would not object to the operation of that facility, *provided* interference did not occur. We emphasize that we would never construe an "assent" as a surrender of a station's rights to protection from any actual interference which may subsequently arise. (Stations in the LPTV Service, including those for which terrain-related waivers are granted, will continue to be secondary to and must not interfere with the regular off-air reception of full-service television stations.) Upon grant of the construction permit, and provided that the engineering parameters of the facility have not changed and provided that it is not causing interference, assent, once given, cannot be withdrawn. We do not believe the public interest would be served by requiring a noninterfering LPTV station, for example, to discontinue operation simply because its new owner could not obtain the same assent afforded to the original owner.

11. Where the assent of a potentially affected station has not been obtained, a waiver request must be supported by a terrain study, from which it can be concluded that the proposed facility would not be likely to interfere at the authorized station's protected contour. We will not prescribe specific requirements for such showings. However, in order to conduct any meaningful evaluation, we will need from applicants accurate profiles of terrain elevations in the directions in which interference is predicted under our standards. Normally, interference is predicted along some arc of a station's protected contour. Applicants should submit a sufficient number of profiles depicting the terrain along signal propagation paths between the site of the proposed facility and the arc of predicted interference. Profiles may be drawn on rectangular coordinate paper, where the horizontal axis represents distance in kilometers and the vertical axis represents elevations above sea level in meters. Each profile should include the following information: (1) identification of the topographic map(s), including its source, from which elevations are taken, (2) an elevation point showing the proposed height of the antenna radiation center above sea level, (3) the azimuth of the terrain path, measured clockwise from True North, (4) identification, including the call sign, of the protected station, and (5) a sufficient number of elevation points to give an accurate representation of the terrain between the proposed site and the protected contour. Generally, points should be spaced at regular distances or terrain contour intervals. However, shorter intervals may be used to reflect abrupt changes in elevation. In addition to terrain profiles, applicants may provide quantitative engineering analysis, such as calculations of obstruction losses, to support claims of noninterference.

12. In evaluating terrain showings, the Commission will consider all information provided by applicants, and may find it necessary to request additional information, including the topographic maps from which terrain elevations were taken. Failure to provide the requested information in a timely manner may result in the dismissal of an application. The nature of our case-by-case evaluations will depend on the conditions surrounding each case, and may involve use of a variety of applicable engineering methods. Applicants, rather than the Commission staff, will bear the burden of supporting waiver requests. In no instance will we grant such a waiver where it would be apparent to us that interference would occur within the protected contour of an authorized station. Although LPTV, translator and booster stations generally are authorized on a noninterference basis, station authorizations granted with a terrain-related waiver will be explicitly conditioned on noninterference to all stations predicted to receive interference, without consideration of terrain shielding. This condition also will appear on any subsequent authorization resulting from the assignment or transfer of the facility to another party. This will provide clear notice that LPTV, translator and booster operators bear responsibility for eliminating such interference.

13. We have elected to proceed in this matter by policy statement, rather than by rule making, in order to expedite consideration of terrain shielding factors in our application process and to thereby accelerate the provision of additional service to the public. This procedural approach is both appropriate and permissible under the express provision of the Administrative Procedure Act (APA) exempting general statements of policy from rule making requirements. 5 U.S.C. Section 553(b)(3)(A). In this regard, we note that our action here simply describes the class of cases in which we will consider terrain shielding showings. It does not purport to establish the standards by which such showings will be evaluated or to determine the disposition of such cases in advance. On the contrary, it is clear from the policy statement that these decisional concerns will be addressed in the context of the particular facts presented in individual applications at the time the applications are processed. These characteristics are consistent with those that the courts have considered significant in classifying an agency action as a general statement of policy for APA purposes. *See, e.g., Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986); *Pacific Gas and Electric Co. v.* FPC, 506 F.2d 33 (D.C. Cir. 1974).

CONCLUSION

14. In this Policy Statement, the Commission has relaxed its policy regarding consideration of terrain shielding in the LPTV service. Subject to certain limitations, we will waive our LPTV application acceptance standards whenever it can be made apparent to us that terrain shielding would provide adequate interference protection. Accordingly, we will grant waiver requests supported either by well-documented terrain showings or by the written assent of all potentially affected stations, together with less rigorous terrain showings. We are confident that our revised policy, resulting from changed processing circumstances, will provide opportunities for additional LPTV, translator

and booster service in areas of the country where terrain shielding is a significant factor. We will observe the effect of this policy on application processing efficiency and the extent to which it permits the authorization of additional stations. If future circumstances should warrant, we will again revisit this policy and make appropriate adjustments.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-37

In the Matter of

Amendment of Section 73.202(b), RM-5595
Table of Allotments,
FM Broadcast Stations.
(Brownsburg, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 1519 (1987), issued herein in response to a petition filed by Bruce Quinn (petitioner), proposing the allotment of Channel 270A to Brownsburg, Indiana, as that community's first local FM service. Petitioner filed comments in response to the *Notice* reiterating his intention to apply for the channel, if allotted. Supporting comments were also filed on behalf of Kenneth and Carolyn McClara and David B. Knoll, collectively. No other comments were received.

2. As indicated in the *Notice*, Channel 270A can be allotted to Brownsburg in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[1]

3. In consideration of the above, we believe the public interest would be served by the instant proposal since it could provide a first local FM service to Brownsburg.

4. Therefore, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Brownsburg, Indiana, as follows:

City	Channel No.
Brownsburg, Indiana	270A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 270A at Brownsburg, Indiana, will open on **June 24, 1988,** and close on **July 24, 1988.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates utilized in this determination are those of the center city, 39-50-36 and 86-23-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-216

In the Matter of

Amendment of Section 73.202(b), RM-5466
Table of Allotments,
FM Broadcast Stations.
(Booneville, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 14, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers the *Notice of Proposed Rule Making* herein, 52 FR 24309, June 30, 1987, issued in response to a petition filed on behalf of Booneville Broadcasting Co. (petitioner), licensee of Station KBSS(FM), Channel 221A, Booneville, Arkansas, proposing the substitution of Channel 284C2 for Channel 221A and modification of its license accordingly. Supporting comments were filed by petitioner. In response to the *Notice*, a counterproposal was filed on behalf of Red White and Blue Communications, Inc.[1] (RWBC) licensee of Station KAJJ-FM (Channel 292A), Greenwood, Arkansas, but was subsequently withdrawn (RM-6059). Reply comments were filed by petitioner, which also filed additional comments after the deadline specified therefor had expired.[2]

2. This proceeding was initiated by petitioner seeking a direct modification of Station KBSS(FM) from Channel 221A to Channel 284C2. The *Notice* indicated, however, that in conformity with Commission precedent, should another interest in the Booneville proposal be expressed, the modification could not be made unless an additional equivalent channel could be made available to accommodate other expressions of interest. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984), and Section 1.420(g) of the Rules.

3. In view of the withdrawal of RWBC's counterproposal, and in the absence of any other expressions of interest in the proposed use of Channel 284C2 at Booneville, we are herein modifying the license of Station KBSS(FM), as requested.

4. We believe the public interest would be served by substituting Channel 284C2 for Channel 221A at Booneville since it would provide the community with its first wide coverage area FM service. As indicated in the *Notice*, Channel 284C2 can be substituted for Channel 221A at Booneville consistent with the requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located at least 8.4 kilometers (5.2 miles) northwest [3] of the community to avoid short spacing to Channel 283A (vacant), Glenwood, Arkansas.[4]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Booneville, Arkansas, as reflected below:

City	Channel No.
Booneville, Arkansas	284C2

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Booneville Broadcasting Company for Station KBSS(FM), Booneville, Arkansas, IS MODIFIED, effective **June 23, 1988,** to specify operation on Channel 284C2 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given August 24, 1987 (Report No. 1673).

[2] These include a Supplement to Reply Comments. Additionally, petitioner filed a Request for Leave to File [Further] Supplemental Comments and [Further] Supplemental Comments on behalf of RWBC. However, of those unauthorized pleadings, we shall accept only the [Further] Supplemental Comments for the express purpose of permitting the withdrawal of RWBC's counterproposal, which is hereby granted.

[3] Reference coordinates of the restricted site are 35-12-44 and 93-56-59.

[4] Channel 283A was allotted to Glenwood in MM Docket No. 84-231, and was the 80th channel selected, for which applications may ultimately be accepted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-392

In the Matter of

Amendment of Section 73.202(b), RM-5890
Table of Allotments,
FM Broadcast Stations.
(Fort Myers, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5931 (1987), proposing to substitute Channel 237C1 for Channel 237A at Fort Myers, Florida at the request of the licensee, Riverside Baptist Church of Fort Myers, Inc. (petitioner). The *Notice* also proposed to modify the license for Station WSOR(FM) to specify the Class C1 channel. Petitioner filed supporting comments.

2. Petitioner in its comments refers to paragraph 2 of the *Notice* which imposed an 18.3 miles site restriction on Channel 237C1 to protect a pending rule making for Channel 291A at Fort Myers Villas, Florida (Docket 88-80). Petitioner argues that a lesser restriction, which would permit the use of Channel 237C1 at its contemplated site,[1] is possible if a modest restriction is placed on Channel 291A. Petitioner also stated its support for the proposed allotment of Channel 237C1 to Fort Myers without regard to the suggested site restriction.

3. The *Notice of Proposed Rule Making* (Docket 88-80) indicates that the transmitter for Channel 291A at Fort Myers Villas is restricted to a site 4.2 kilometers east of the city to avoid short spacing to pending applications for Channel 290A at Englewood, Florida (Docket 84-231). The petitioner has not presented any evidence that an 18.3 mile site restriction on Channel 237C1 would present insurmountable problems. Therefore, based on a lack of showing that a transmitter at this distance makes Channel 237C1 unusable, we see no reason to impose a further restriction on Channel 291A at Fort Myers Villas to accommodate petitioner's preference of site. Moreover, because commenters in the Fort Myers Villas proceeding are not on notice that an additional site restriction might be appropriate, the matter is more properly raised by the filing of comments in that proceeding.

4. We believe that the public interest would be served by substituting Channel 237C1 for Channel 237A at Fort Myers, in order to provide the community with its third wide coverage area FM station. We shall also modify the Class A license for Station WSOR(FM), at Fort Myers to specify operation on the Class C1 channel as requested. As stated in the *Notice* the transmitter site for Channel 237C1 must be located at least 29.4 kilometers (18.3 miles) west of the city to avoid short spacing to a pending rule making for Channel 291A at Fort Myers Villas, Florida (Docket 88-80).[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

City	Channel No.
Fort Myers, Florida	237C1, 245C, 270C

6. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WSOR(FM), Fort Myers, Florida, IS MODIFIED to specify operation on Channel 237C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHERED ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner proposed a site at coordinates 26-35-19 and 82-06-12.

[2] Coordinates for this restricted site are 26-40-30 and 82-10-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-404

In the Matter of

Amendment of Section 73.202(b), RM-5814
Table of Allotments,
FM Broadcast Stations.
(McCall, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6004 (1987), proposing the allotment of Channel 252A to McCall, Idaho, at the request of Mary Rhoads (petitioner). Petitioner filed comments restating her interest in the channel.

2. The Commission believes that the public interest would benefit from the allotment of Channel 252A to McCall, Idaho, in order to provide a third FM service to that community. The channel can be allotted in compliance with the minimum distance separation requirements.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	Channel No.
McCall, Idaho	252A, 266C1, 294A

4. The window period for filing applications on Channel 252A at McCall will open on **June 24, 1988,** and close on **July 24, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 252A at McCall are 44-54-30 and 116-06-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-381

In the Matter of

Amendment of Section 73.202(b), RM-5934
Table of Allotments,
FM Broadcast Stations.
(Slaton, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Williams Broadcast Group (petitioner), licensee of Station KJAK(FM), Channel 225A, Slaton, Texas, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 5632 (1987), proposing the substitution of Channel 224C for Channel 225A at Slaton, and modification of its station's license to specify operation on the higher class channel. Petitioner filed supporting comments reiterating its interest in the modification of its facilities.

2. Petitioner states that because of potential objections from the Federal Aviation Administration (FAA), concerning the tower height for a full Class C station, it would prefer a Class C1 channel. Petitioner contends that no other FM station in its area operates or proposes to operate with more than Class C1 facilities. Therefore, petitioner seeks to modify its facilities on Channel 224C1.

3. In view of the petitioner's expressed desired to avoid a possible problem with FAA approval for a full Class C facility, we shall consider the substitution of Class C1 Channel 224 for Channel 225A at Slaton. The substitution can be made in compliance with the Commission's minimum separation requirements from the petitioner's current transmitter site which is 10.2 kilometers (6.3 miles) northwest of Slaton.[1]

4. We believe the public interest would be served by the substitution of Channel 224C1 for Channel 225A at Slaton, Texas, as that community's first wide coverage area FM service. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KJAK(FM) to specify operation on Channel 224C1.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Slaton, Texas	224C1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KJAK(FM), Slaton, Texas, IS MODIFIED, to specify operation on Channel 224C1 in lieu of Channel 225A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The site coordinates are 33-29-38 and 101-44-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-364

In the Matter of

Amendment of Section 73.202(b),	RM-5683
Table of Allotments,	
FM Broadcast Stations.	
(Wabash, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 5614 (1987), issued herein in response to a petition filed on behalf of Conaway Communications Corporation (petitioner), proposing the allotment of Channel 290A to Wabash, Indiana, as that community's second local FM broadcast service. Supporting comments were filed by petitioner reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 290A to Wabash, Indiana, since it could provide an additional voice to the community for the expression of diversified viewpoints and programming.

3. As indicated in the *Notice*, Channel 290A can be allotted to Wabash, Indiana, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1] Additionally, since the proposed allotment is within 320 kilometers (199 miles) of the Canadian border, concurrence of that government was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Wabash, Indiana	240A, 290A

5. The window period for filing applications on Channel 290A at Wabash, Indiana, will open on **June 24, 1988,** and close on **July 24, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates utilized for Channel 290A at Wabash are 40-47-52 and 85-49-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-348

In the Matter of

Amendment of Section 73.202(b), RM-5708
Table of Allotments,
FM Broadcast Stations.
(Woodville, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Trinity Valley Broadcasting Company (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 5590 (1987), proposing the allocation of Channel 234C2 to Woodville, Texas, as that community's first local FM service. Petitioner filed comments reaffirming its intention to apply for the channel.

2. Channel 234C2 can be allocated to Woodville in compliance with the Commission's minimum distance separation requirements, with a site restriction of 23.5 kilometers (14.6 miles) north of the city.[1] The restricted site is necessary to avoid short spacings to applications filed by two stations in Beaumont, Texas, Station KQXY(FM), Channel 231 and Station KZZB-FM, Channel 236.

3. We believe the public interest would be served by allocating Channel 234C2 to Woodville, Texas, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Woodville, Texas	234C2

4. The window period for filing applications will open on **June 24, 1988,** and close on **July 24, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for the restricted site are 30-59-14 and 94-25-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

KANNAPOLIS TELEVISION CO., A JOINT VENTURE Kannapolis, North Carolina	**BC DOCKET NO. 82-259** File No. BPCT-790928KI
COMMUNITY ACTION COMMUNICATIONS, INC. Kannapolis, North Carolina	**BC DOCKET NO. 82-260** File No. BPCT-800516KO

For Construction Permit for a New Television Station

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1988; Released: May 9, 1988

By the Commission:

1. Before the Commission are: (1) a Petition for Reconsideration filed January 5, 1987 by Community Action Communications, Inc. (Community), (2) a Petition for Leave to Amend filed January 5 by Community, and (3) Comments filed January 15 by Kannapolis Television Company, A Joint Venture (Kannapolis). These pleadings relate to a Memorandum Opinion and Order by the Commission rejecting a settlement agreement between Kannapolis and Community and granting Kannapolis' application for a new UHF television station at Kannapolis, North Carolina. *Kannapolis Television Co.*, 1 FCC Rcd 1037 (1986).

I. BACKGROUND

2. Kannapolis and Community are mutually exclusive applicants for a new UHF television station on Channel 64 at Kannapolis, North Carolina. The Review Board granted Kannapolis' application and denied Community's. The Board imposed a decisive demerit against Community under a character issue, because one of its principals, Rev. D. Garland Faw, was found to have committed fraudulent land conveyances and to have made two false oaths regarding his assets in a bankruptcy proceeding. *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984). Community filed an Application for Review of the Board's Decision. During the pendency of the Application for Review, the parties filed a settlement agreement calling for the dismissal of Kannapolis' application and the grant of Community's.

3. The Commission denied the settlement agreement. It held that the agreement should be evaluated under the standards set forth in the recently adopted policy statement on character qualifications. *Character Qualifications*, 102 FCC 2d 1179, recon. denied, 1 FCC Rcd 421 (1986) (hereinafter *Character Policy Statement)* . Applying those standards to the facts before it, the Commission found that, because of Rev. Faw's misconduct, Community lacked the requisite qualifications to be a Commission licensee. Consequently, the Joint Petition for Approval of Settlement Agreement, which called for a grant of Community's application, was denied.

II. CHANGED CIRCUMSTANCES

4. In the pleadings before us, Community attempts to reargue the grounds on which it was previously found disqualified. This is not a proper basis for reconsideration. See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). Community also reports that Rev. Faw has resigned as an officer and director of Community and of Community's parent organization, Truth Temple. Rev. Faw has also abrogated his commitment to serve as general manager of the proposed broadcast station. Rev. Faw has been replaced as chairman of the board of Community by Joel V. Fowler, Jr. and as director of Truth Temple and of Community by Harvey W. Fowler. Bobby G. Bost replaced Joel Fowler as president of Community.

5. Community submits that Rev. Faw's resignation constitutes a change in core circumstances which moots the Commission's concerns about Community's qualifications. Community also asserts that it has shown good cause for the Commission to accept the amendment reflecting Rev. Faw's resignation, because doing so not only would not prejudice Kannapolis, which has agreed to settle the case, but also would lead to an expeditious resolution of this proceeding. Kannapolis does not oppose the relief Community requests.

6. Rev. Faw's resignation raises difficult questions, coming as it does late in this proceeding after an adverse determination. The circumstances of Rev. Faw's withdrawal must be considered to determine whether there is good cause for permitting Community to amend its application. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981); *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). In this regard, there is a question as to whether Community has exercised due diligence in securing Rev. Faw's resignation, and the possibility of improper upgrading of Community's position with respect to Kannapolis must also be taken into account.

7. On balance, we believe that the circumstances of this case justify extraordinary relief. A crucial aspect of the resolution of this matter was the decision to apply to pending cases the new *Character Policy Statement*, which abolished the practice of imposing comparative demerits based on character. In this case, neither the ALJ nor the Review Board found Community unqualified to be a licensee. Rather, the Board had imposed a comparative character demerit on Community. The *Character Policy Statement's* removal of comparative demerits could thus have been interpreted as removing any stigma from Rev. Faw's past conduct; indeed, the Mass Media Bureau urged this approach here. The Commission, however, took a different approach. We reexamined the character issue and

decided that Rev. Faw's conduct rendered Community unqualified to be a licensee. This turn of events may have been contrary to Community's expectations based on the prior decisions in this proceeding and its understanding of the Commission's intentions. Thus, it does not appear that Community has taken an unwarranted "wait-and-see" attitude - which would have wasted administrative resources and delayed the resolution of the proceeding - in not removing Rev. Faw previously.

8. As to any improper upgrading, Kannapolis has voluntarily chosen to enter into a settlement agreement and does not now oppose reconsideration. A settlement agreement is a private contractual arrangement which the Commission has no grounds to nullify, if it is properly entered into by competing applicants in a comparative proceeding and if it is consistent with Commission policy. *Bison City Television 49 Limited Partnership*, 51 RR 2d 307, 310 (1982). This situation is therefore similar to a single-party proceeding in which an amendment would serve to resolve the case, avoiding further administrative expense, and would not unfairly prejudice any competing applicant. See *Son Broadcasting, Inc.*, 92 FCC 2d 450 (Rev. Bd. 1982) (accepting an amendment under those circumstances). Thus, this case presents equities which would not exist in the absence of a settlement agreement.

9. Rev. Faw's withdrawal eliminates the basis upon which the parties' settlement agreement was previously denied. Accordingly, we will now reexamine its provisions. Under the terms of the settlement agreement, Community's application would be granted and Kannapolis' application would be dismissed. The agreement calls for Community to pay Kannapolis $300,000 in reimbursement and to give Kannapolis a five-year right of first refusal to purchase Community's construction permit or station. The parties have submitted statements indicating that their applications were not filed for the purpose of reaching or carrying out a settlement agreement. In comments filed at the time the agreement was first before the Commission, the Mass Media Bureau agrees that the agreement complies with the Commission's rules and the Communications Act. See 47 U.S.C. § 3ll(c); 47 C.F.R. § 73.3525. We agree that the parties' settlement will serve the public interest, and we will approve it. However, because our approval depends crucially on Rev. Faw's severance from Community, we will condition our action on receiving written assurance from Community that Rev. Faw will not participate in station affairs.

III. ORDERS

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend and the Petition for Reconsideration filed January 5, 1987 by Community Action Communications, Inc. ARE GRANTED and the associated Amendment IS ACCEPTED.

11. IT IS FURTHER ORDERED, That the Memorandum Opinion and Order, FCC 86-444 released December 5, 1986 (1 FCC Rcd 1037) IS MODIFIED as provided herein.

12. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Agreement and Dismissal of Application filed June 19, 1986 by Kannapolis Television Company, A Joint Venture and Community Action Communications, Inc. as Supplemented July 3 and 24, 1986 IS GRANTED and the associated Settlement agreement IS APPROVED, provided that Community files within 30 days the written assurance referred to in paragraph 9.

13. IT IS FURTHERED ORDERED, That the application of Community Action Communications, Inc. (File No. BPCT-800516KO) IS GRANTED and the application of Kannapolis Television Company, A Joint Venture (File No. BPCT-790928KI) IS DISMISSED with prejudice.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-190

In re Applications of

ROBERT WILSON & PATRICIA PHIPPS (hereafter W & P) — File No. BPH-860623MA

CUSTER BROADCASTING CORPORATION (hereafter CBC) — File No. BPH-860623MB

For Construction Permit for a New FM Station, Custer, South Dakota, Channel 286C2.

HEARING DESIGNATION ORDER

Adopted: April 18, 1988; Released: May 9, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

PRELIMINARY MATTERS

2. On July 8, 1986, CBC filed a "Request for Dismissal" of W & P's application on the grounds that the application was untenderable because the engineering portions of the application were signed and dated June 19, 1986, after the execution of the application itself, which was signed on June 18, 1986. However, as pointed out by W & P in its July 11, 1986 response, CBC has cited no provision of the Commission's tenderability criteria which could support such a conclusion, and indeed, none exists. *See* Appendix D to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). Furthermore, in that the application, including the engineering report, was complete when filed on June 23, 1986, we find the objection baseless and thus will dismiss it in an appropriate ordering clause.[2]

3. *Unresolved issues.* CBC states in its application for the FM allocation that its principals are also the principals of Custer Communications, Inc. (CCI) that has pending an application for an AM frequency in Custer, South Dakota. However, since the time of the AM filing, CCI reached a settlement agreement with a competing applicant for the AM frequency, French Creek Communications, and withdrew its application. However, French Creek had raised several serious character matters which were not resolved.

4. In its Motion to Enlarge Issues, filed September 10, 1986, and in its Supplement to that Motion filed September 11, 1986, French Creeek requested that five issues be specified: (1) a real party-in-interest issue; (2) an interrelated real party misrepresentation issue; (3) a financial qualifications issue; (4) an interrelated false financial certification issue; and (5) a false site availability certification issue. The presiding Administrative Law Judge, in a *Memorandum Opinion and Order* for Docket No. 86-321, released October 3, 1986, granted this uncontested motion to enlarge issues. However, CCI's application, pursuant to the settlement agreement with French Creek, was dismissed by *Order*, FCC 86M-3427, released November 24, 1986, prior to the resolution of the above-referenced issues. Since CBC's principals, Eileen Cofell and Luanne Quick, are also those who filed the CCI application, these unresolved issues call into question CBC's qualifications to be a Commission licensee. Therefore, appropriate issues will be specified below.

OTHER MATTERS

5. *EEO.* In response to Section VI of FCC Form 301, both applicants indicated that they will employ five or more fulltime employees. [3] Therefore, each is required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. W & P indicates only that the South Dakota Job Service will serve as a referral source but provides no specific minority or female recruitment sources. Accordingly, W & P will be required to amend its application within 30 days of the release of this Order, by submitting specific sources of female recruitment to the presiding Administrative Law Judge.

6. *Line - of - sight.* Section 315(b) of the Commission's Rules, 47 C.F.R. § 315(b), states that "[the] location of the [proposed FM] antennas should be so chosen so that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path." In its Engineering Statement, CBC indicates that it had "exhausted all possibility of locating a site where all of Custer could be covered by line-of-sight transmission. It is absolutely impossible without severely deteriorating the coverage." W & P made no such statement. Accordingly, an issue will be specified regarding CBC's compliance with 47 C.F.R. § 315(b).

7. *Air hazard.* Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant has been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANT: CBC

8. Except as may be indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN

A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1 (a). To determine whether Eileen Cofell and Luanne Quick are the real-parties-in-interest to CCI's application (BPH-860623MB);

(b). To determine whether CCI has misrepresented facts to the Commission regarding its ownership structure;

(c). To determine whether CBC is financially qualified to build and operate its proposed station;

(d). To determine whether CBC lacked candor when it responded affirmatively to the financial certification questions in Section III of Form 301 in application number BP-851202AH;

(e). To determine whether CCI falsely certified its site availability in a January 13, 1986 amendment to BP-851202AH;

(f). To determine, in light of the determination of the preceding issues, whether CBC possesses the requisite basic qualifications to be a Commission licensee.

2. To determine whether CBC's proposed site is in compliance with 47 C.F.R. Section 73.315(b) and thus would provide a line-of-sight from the antenna over the principal city to be served, without major terrain obstruction, and if not, whether circumstances exist which warrant a waiver of that Section.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: CBC.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Requests for Dismissal filed by Custer Broadcasting Corporation on July 8, 1986 and August 4, 1986, ARE HEREY DENIED.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, W & P shall submit data relative to paragraph IV of its Model EEO Program as specified in paragraph 5 above, and CBC shall file a corrected response to Section VI of FCC Form 301, with the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 31, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Dianne E. Ellis (File No. BPH-860613MF) was returned November 19, 1987.

[2] W & P filed an amendment re-certifying the accuracy and completeness of the information in their application on July 18, 1986, allegedly without any prompting from CBC. On August 4, 1986, CBC restated its prior objection and claimed that acceptance of W & P's amendment at that time would destroy the integrity of the Commission's application process. W & P restated its opposition on August 19, 1986. For the reasons discussed above, CBC's objection of August 4, 1986 will be denied. Additionally, as W & P's July 18, 1986 amendment did not attempt to cure a tenderability defect (there being no such defect), no harm is done to the Commission's processing system by it acceptance.

[3] CBC actually answered "no" to this question, but submitted a Model Equal Employment Opportunity Program. We therefore assume that the negative response was a typographical error which CBC will be allowed to correct within 30 days of the release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-206

In re Applications of

MARY FAYE GILBERT (hereafter Gilbert) — File No. BPH-870526MA

BELLE CHASSE ENTERPRISES, INC. (hereafter Enterprises) — File No. BPH-870526ME

SUNSETT BROADCASTING CO. L. P. (hereafter Sunsett) — File No. BPH-870527MA

Randolph J. Callender d/b/a FIRST BELLE CHASSE MEDIA GROUP, A Partnership in Commendam (hereafter Callender) — File No. BPH-870527MB

AREA BELLE CHASSE COMMUNITY RADIO (hereafter Area) — File No. BPH-870527MC

BELLE CHASSE RADIO LIMITED PARTNERSHIP (hereafter Belle Chasse) — File No. BPH-870527ME

For Construction Permit for a
New FM Station, Channel 275A, 102.9 MHz
Belle Chasse, Louisiana

HEARING DESIGNATION ORDER

Adopted: April 26, 1988; Released: May 9, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Callender.* In a timely filed amendment of July 15, 1987, Callender has indicated that he is employed as News Director of WYLD(AM & FM), New Orleans, Louisiana and that he will terminate his employment with those stations, prior to the commencement of program test authority, if he receives a construction permit for Belle Chasse as a result of this proceeding. Accordingly, an appropriate condition will be added.

3. *Belle Chasse.* The applicant has requested a waiver of 47 C.F.R. § 73.315 since its proposal would result in 1 mV/m contour coverage of 97.5% of both the population and area of Belle Chasse. The staff has determined that the application is in substantial compliance with 47 C.F.R. § 73.315. Accordingly, Belle Chasse's request for waiver will be dismissed as moot.

4. *Area.* On November 13, 1987, Area filed an amendment to its application. The amendment proposes a new transmitter site. Under the new "window" processing rules adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985) an applicant is provided a 30-day period (running from the release of a *Public Notice* announcing the tenderability of the application)[1] to perfect its application for filing. Afterward, the filing of amendments is severely constrained. 50 Fed. Reg. at 19941. These constraints are set forth in 47 C.F.R. § 73.3522(a)(6):

> [Commercial FM applications] may be amended as a matter of right during the appropriate [filing] window . . . For a period of 30 days following the FCC's issuance of a Notice of Tenderability announcing the acceptance of the applications [for tender], amendments that go to the acceptability or grantability of an application may be filed as a matter of right. Subsequent [predesignation] amendments . . . will be considered only upon a showing of good cause for late filing or pursuant to 47 C.F.R. Section 1.65 or [47 C.F.R.] Section 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration . . .

5. Late filed predesignation amendments will be considered only upon a showing of good cause or pursuant to 47 C.F.R. § 1.65, which requires the prompt filing of an amendment to reflect significant changes in information previously given in an application or pursuant to 47 C.F.R. § 73.3514. Area's amendment merely states that it is filed "due to possible future complications using the previously proposed site." Without elaboration, the applicant has failed to provide evidence of good cause or to state specific circumstances which would warrant acceptance of a late filed amendment. Accordingly, it will be returned.

6. *Other Matters.* Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS: Enterprise and Area.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard com-

parative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Enterprise and Area.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Callender, he shall terminate his employment as News Director of WYLD(AM & FM), New Orleans, Louisiana prior to commencing program test authority at Belle Chasse.

11. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. § 73.315 by Belle Chasse IS DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 4 and 5, above, the November 13, 1987 amendment filed by Area IS RETURNED AS UNACCEPTABLE FOR FILING.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 31, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMM' :ION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Such a notice for the applications filed for Belle Chase, Louisiana was released on June 22, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-205

In re Applications of

LOCAL MORGAN HILL RADIO ASSOCIATES (hereafter Local)	File No. BPH-870625ML
MORGAN HILL FM LIMITED PARTNERSHIP (hereafter MHF)	File No. BPH-870629MX
ETHNIC RADIO OF LOS BANOS, INC. (hereafter Ethnic)	File No. BPH-870629MZ
MORGAN HILL BROADCASTING, A California Limited Partnership (hereafter MHB)	File No. BPH-870629NB
TORO BROADCASTING GENERAL PARTNERSHIP (hereafter Toro)	File No. BPH-870629ND
ERIC R. HILDING (hereafter Hilding)	File No. BPH-870629NH
Laura W. Herron and Gregory S. Genetti d/b/a HERRON & GENETTI (hereafter H&G)	File No. BPH-870629NK
PETER MIEULI (hereafter Mieuli)	File No. BPH-870629NN

For a Construction Permit for
a New FM Station on Channel 241A
in Morgan Hill, California

HEARING DESIGNATION ORDER

Adopted: April 21, 1988; Released: May 9, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hilding.* The applicant has given a negative response to the query in Section III, FCC Form 301, pertaining to financial certification. Consequently, an issue as to the applicant's financial qualifications will be specified below.

3. Hilding has also stated, in response to FCC Form 301, Section II, Item 7, that he is the Sales Manager for KSCO (AM), Santa Cruz, California, and that he will resign this position prior to requesting program test authority for new FM service in Morgan Hill, California. Furthermore, by amendment filed January 27, 1988, the applicant disclosed that he is also Sales Manager for KLRS (FM), Santa Cruz, California, and pledged that he will also resign this position prior to requesting program test authority for new FM service in Morgan Hill, California. Accordingly, appropriate conditions will be specified below.

4. *Toro.* In response to FCC Form 301, Section II, Items 4 and 7, Toro general partner Fred Guzman stated that he is Executive Editor of the Morgan Hill Times in Morgan Hill, California and that he will resign this position in the event that Toro's application for new FM service in Morgan Hill, California is granted. Accordingly, an appropriate condition will be specified below.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
MHB	November 3, 1987
Mieuli	December 7, 1987
H&G	January 15, 1988
Toro	October 7, 1987; January 20, 1988
Hilding	January 27, 1988
LOCAL	March 9, 1988

6. Data subm itted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANTS: LOCAL, MHF.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the following applicant whether, in light of the evidence adduced concerning the deficiency set forth above in this Order, the applicant is financially qualified: Hilding.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: LOCAL, MHF.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: MHB, Mieuli, H&G, Toro, Hilding, LOCAL.

11. IT IS FURTHER ORDERED, That in the event of a grant of the Hilding application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal, Eric R. Hilding, has resigned the position of Sales Manager of both KSCO (AM) and KLRS (FM), Santa Cruz, California.

12. IT IS FURTHER ORDERED, That in the event of a grant of the Toro application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal, Fred Guzman, has resigned the position of Executive Editor of the Morgan Hill Times in Morgan Hill, California.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this preceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **May 31, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-393

In the Matter of

Amendment of Section 73.202(b),	RM-5966
Table of Allotments,	RM-6170
FM Broadcast Stations.	
(Roland and Heavener, Oklahoma)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Family Broadcasting Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5933 (1987), proposing the allocation of Channel 222A to Roland, Oklahoma, as the community's first local FM service. The petitioner filed comments reiterating its intention to apply for the channel, if allocated.[2] Double Eagle Broadcasting Corp. (Double Eagle) filed comments and a counterproposal requesting instead the substitution of Channel 223C2 for allotted and applied for Channel 223A at Heavener, Oklahoma. [3] Reply comments were filed by the petitioner, Double Eagle, and LeRoy Billy (Billy), applicant for Channel 223A at Heavener.

2. According to Double Eagle, a prior investigation confirmed that Channel 223A at Heavener could be upgraded to a Class C2. It states that it planned to seek a construction permit on the Class A, and if granted, would operate the station while simultaneously pursuing a co-channel upgrade. To this end, it located a transmitter site north of Heavener. It contends that such a transmitter location is required in order for the Class A station to be economically viable. In addition, it states that the station needs to provide interference-free service to as large an area as possible due to its proximity to Poteau, Oklahoma, and Fort Smith, Arkansas, which have at least four Class C FM stations. It submits that, unfortunately, with the adoption of the *Notice* proposing the allocation of Channel 222A to Roland the Commission "effectively short-spaced" its desired transmitter site and, therefore, Double Eagle chose not to apply for the channel. However, if Channel 223C2 is allocated to Heavener, Double Eagle requests that a new filing window be opened so that it may apply for the channel.

3. Double Eagle contends that the public interest would be better served by the allocation of a single higher powered channel to Heavener than by the allocation of two closely spaced Class A allotments at both Heavener and Roland. In support, Double Eagle states that Roland and Heavener are located in the Fort Smith metropolitan area. Further, it claims that a station at either community needs to cover the metropolitan area so that local residents may stay tuned to the station as they commute to their places of employment. Based on its broadcast experience, Double Eagle states that a Class A station at either Heavener or Roland will "ultimately fail, or be of only marginal success as a business venture," a situation which would be exacerbated by the allocation of a closely spaced adjacent channel at Roland. Therefore, it urges the allocation of Channel 223 as a Class C2 to Heavener and the denial of Channel 222A at Roland. While it states that both are esentially 'bedroom' communities of Fort Smith, it contends that Heavener is more likely to maintain a separate identity.

4. Billy also opposes the allocation of Channel 222A to Roland. He argues that since the Roland channel cannot be allocated using center city coordinates that the proposal should be considered as a request for a short- spaced allotment. He states that petitioner has failed to provide a showing of compelling need or extraordinary circumstances to warrant a grant of such a request. Billy recognizes that Channel 222A can be allocated to Roland in compliance with the Commission's minimum distance separation requirements if petitioner's request for the imposition of a site restriction is granted. Nevertheless, Billy contends that a site restriction cannot be imposed on an allotment absent a showing that such a restriction is not only possible but that sites are available within the restricted area. Based on petitioner's failure to provide such a showing, Billy argues that its proposal must be denied.

5. According to Billy's consulting engineer, use of Channel 222A at the site specified in the *Notice* would result in significant shadowing unless the antenna radiation center is located 146 meters (480 feet) above ground level, which it states is an "unusual and extreme" height for Class A stations. Further, use of the site would cause his application to be short-spaced by 1.2 kilometers to the Roland allotment. Billy proposes to place his transmitter on Poteau Mountain which he characterizes as "exactly the type of transmitter site idealized by Section 73.315(b) of the rules." He states that his proposed transmitter site is in an uninhabitated area of high elevation with line-of- sight clearance into Heavener. However, he submits that Channel 222A can be allocated to Roland without conflicting with his application if an additional site restriction is imposed on the Roland allotment. Billy states there are several locations of high elevation with line-of-sight paths into Roland if the transmitter is located on Petree Mountain. Therefore, he urges that an additional site restriction be imposed to avoid a short-spacing to his application if Channel 222A is allocated to Roland.

6. As to Double Eagle's proposal to substitute Channel 223C2 for Channel 222A, Billy states that the channel cannot be used at either Heavener's reference point or at his applied-for transmitter site. Billy does not oppose the substitution of channels, *per se*. However, he opposes the opening of a new filing window for other potential applicants. Therefore, if the Commission decides that Channel 223C2 should be substituted for the Class A at Heavener, Billy urges that only existing applicants be permitted to apply for the higher powered facility.

7. Double Eagle, in its reply comments, reiterates his opposition to the allocation of Channel 222A at Roland. It also contends that the application of Billy, which is short-spaced to the proposal herein, is untenderable for filing. Therefore, it submits that the decision before the Commission is solely between the Class C2 at Heavener and the Class A at Roland. Double Eagle again states that a Chan-

nel 222A allotment at Roland would preclude the allocation of Channel 223C2 to Heavener. Disputing Billy's contention that the allocation of Channel 223C2 would not comply with the Commission's minimum distance separation requirements, he states that a site restriction could be imposed which would provide the required protection to Station KDQN-FM, Channel 224A, DeQueen, Arkansas. Double Eagle, in conclusion, states that should the channel be allocated to Roland, as proposed, it will apply for any other Class C2 which the Commission allocates to Heavener or a nearby community.

8. In his reply comments, petitioner asserts that Double Eagle's counterproposal lacks merit. He states that Double Eagle has made no public interest showing for the Class C2 at Heavener, noting that it has not provided any data concerning the population and area which would be served by a Channel 223C2 station or a showing of any first or second aural service which would be provided by the Class C2 station rather than the Class A. Therefore, he argues that his proposal for a first local service at Roland is superior to the proposed upgrade at Heavener. However, should Channel 223C2 be allocated, petitioner states that a new filing window should be opened.

9. Petitioner also claims that Billy's opposition is without merit because the Commission does not protect an applicant's preferred transmitter site where it is in conflict with a proposed new service absent a compelling showing. Petitioner argues that Billy's statement that the Heavener site is "ideal" does not constitute such a showing, citing *Las Vegas, Nevada*, 59 R.R. 2d 1330 (1986). Further, contrary to Billy's assertion that a special detailed showing needs to be provided before an allotment can be made with a site restriction, petitioner states that it is a common practice for the Commission to allocate channels that protects co- or adjacent channels through the use of such site restrictions.

10. As to the broadcast needs of Roland, petitioner states that it is an unincorporated community with a popultion of approximately 2,500. It goes on to note that Roland is a center of business activity, with approximately 18 commercial establishments, and that it has other community indicia, such as churches, public service organizations and day care centers. Thus, it believes that Roland "clearly warrants" a first Class A allotment before Heavener is granted a Class C2 in lieu of its Class A.

DISCUSSION

11. After considering the pleadings before us, we initially find that the counterproposal of Double Eagle to substitute Channel 223C2 for Channel 223A at Heavener should be denied. It is the Commission's policy that where a higher class channel is made available to a community for the first time, and the originally allotted channel is unlicensed and the pending applications have not yet been processed and designated for hearing, a new filing window must be opened so that all interested parties may apply for the allotment. The Commission has also stated that it is not our intention to proceed with a new window over the objection of the applicants. *See Lafayette, Louisiana*, 2 FCC Rcd 7303 (1987), and cases cited therein. Channel 223C2 can be allocated in compliance with the Commission's minimum distance separation requirements if Channel 222A is not allocated to Roland. However, Billy, the only applicant for the channel at Heavener, has objected to the allotment if it would require that a new window be opened for the filing of competing applications. Therefore, we shall not substitute Channel 223C2 for Channel 223A at Heavener. Should Double Eagle desire the allocation of another Class C2 channel to Heavener or a nearby community, it may request the allotment in a separate petition for rule making.

12. Second, we find that Channel 222A should be allocated to Roland as the community's first local FM service. Channel 223A was allocated to Heavener in the omnibus FM rule making proceeding, MM Docket 84-231. In proposing the co-channel allocation at Roland, the Commission noted the allotment at Heavener, for which the filing window had not yet opened, and made provision for its protection by site restricting the Roland channel to an area at least 4.2 kilometers (2.6 miles) north. Likewise, the Commission's Rules require applicants to specify transmitter sites which comply with the minimum distance separation requirements to all proposed allotments, including Channel 222A at Roland. We note that Billy failed to do so and instead requested a transmitter site which is approximately 1.6 kilometers short-spaced to the Roland proposal. We find that Billy has not provided a sufficient and compelling reason to consider the site proposed in his application as more than a preference. Our engineering study indicates that petitioner's desire for a first local service at Roland and Billy's preference to use the transmitter site specified in his application can both be accommodated. The short-spacing between the site proposed by Billy in his Heavener application and the allocation of Channel 222A at Roland will be negated if Channel 222A is allocated to Roland with a site restriction of 5.5 kilometers north, in lieu of the originally proposed 4.2 kilometer north site restriction. We note that Billy has stated that there are sites available from which a Roland applicant could provide the required city-grade service to the community and petitioner raised no objection to the imposition of the additional site restriction. Therefore, we believe the public interest would be served by modifying the site restriction on Channel 222A at Roland since it could permit the earlier inauguration of a first local service at both communities. We reiterate, however, that while an applicant is protected against the acceptance of untimely-filed competing applications, the Commission has not protected an applicant's preferred transmitter site from a rule making request which proposes a new service. *See Freedom and Morgan Hill, California*, FCC Rcd 2181 (1987).

13. Based on the above discussion, we believe the public interest would be served by allocating Channel 222A to Roland, Oklahoma, as an interest has been expressed in providing the community with its first local FM service. Channel 222A can be allocated to Roland in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) north.[4] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 24, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Roland, Oklahoma	222A

13. The window period for filing applications will open on **June 27, 1988,** and close on **July 27, 1988.**

14. IT IS FURTHER ORDERED, That the counterproposal of Double Eagle Broadcasting Corp. requesting the substitution of Channel 223C2 for Channel 223A at Heavener, Oklahoma (RM-6170), IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Heavener, Oklahoma, has been added to the caption.

[2] Petitioner's late-filed comments were accompanied by a request for their acceptance, stating that the failure to file supporting comments was not a conscious act but rather an "inadvertent oversight". Counsel states that the petition for rule making was filed *pro se* and that counsel was not consulted until after receipt of the counterproposal of Double Eagle Broadcasting Corp. Petitioner's late-filed comments will be accepted for purposes of reaffirming its interest in the allocation of Channel 222A to Roland.

[3] Public Notice of the counterproposal was given on December 9, 1987, Report No. 1697.

[4] The coordinates for this allotment are: North Latitude 35-28-20; West Longitude 94-30-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-508

In the Matter of

Amendment of Section 73.202(b), RM-5856
Table of Allotments,
FM Broadcast Stations.
(Ida Grove, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Buena Vista College (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6919 (1987), proposing the substitution of Channel 225C2 for Channel 224A at Ida Grove, Iowa, and the modification of its license for Station KIDA(FM) to specify operation on the higher powered channel. Petitioner filed comments expressing continuing interest in Channel 225C2. No other comments were received.

2. Channel 225C2 can be allocated to Ida Grove in compliance with the Commission's minimum distance separation requirements and can be used at Station KIDA(FM)'s present transmitter site.[1] As proposed, we shall also modify petitioner's license for Station KIDA(FM) to specify operation on Channel 225C2.

3. We believe the public interest would be served by substituting Channel 225C2 for Channel 224A at Ida Grove, Iowa, since it could provide the community and its environs with expanded radio service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 24, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ida Grove, Iowa	225C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Buena Vista College for Station KIDA(FM), Ida Grove, Iowa, IS MODIFIED effective **June 24, 1988,** to specify operation on Channel 225C2, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-15-16 and West Longitude 95-23-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-35

In the Matter of

Amendment of Section 73.202(b), RM-5596
Table of Allotments,
FM Broadcast Stations.
(Ellettsville, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 1515 (1987), issued in response to a petition filed by Bruce Quinn (petitioner), proposing the allotment of Channel 286A to Ellettsville, Indiana, as that community's first local FM service. Supporting comments were filed by petitioner reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 286A can be allotted to Ellettsville consistent with the minimum distance separation requirements contained in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is sited in an area at least 6.3 kilometers (3.9 miles) west[1] of the community to negate a short spacing to Station WWWY(FM) (Channel 285A), Columbus, Indiana.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 24, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Ellettsville, Indiana, as follows:

City	Channel No.
Ellettsville, Indiana	286A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 286A at Ellettsville, Indiana, will open on **June 25, 1988,** and close on **July 25, 1988.**

6. For further information concerning the above, contact Nancy Joyner, (202) 634-6530, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates of the restricted site are 39-14-28 and 86-41-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-453

In the Matter of

Amendment of Section 73.202(b),	RM-5739
Table of Allotments,	
FM Broadcast Stations.	
(Bremen, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 6533 (1987), issued in response to a petition filed on behalf of Margaret E. Karwatka (petitioner) proposing the allotment of Channel 245A to Bremen, Indiana, as that community's first FM broadcast service. Supporting comments were filed by petitioner reiterating her intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by alloting Channel 245A to Bremen, Indiana, since it could provide a first local FM broadcast service to that community.

3. As indicated in the *Notice*, Channel 245A can be allotted to Bremen in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located at least 9.0 kilometers (5.6 miles) east of the community to avoid a short-spacing to Station WCOE(FM) (Channel 244A), LaPorte, Indiana. Additionally, since the proposed allotment is within 320 kilometers (199 miles) of the Canadian border, concurrence of that government was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 24, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Bremen, Indiana	245A

5. The window period for filing applications on Channel 245A at Bremen, Indiana, will open on **June 25, 1988,** and close on **July 25, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-192

In the Matter of

Amendment of Section 73.202(b),	RM-5928
Table of Allotments,	RM-6262
FM Broadcast Stations.	
(Oroville and Monte Rio, California)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 6, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration are two separately-filed petitions for rule making which are mutually-exclusive. Oroville Radio, Inc. (ORI), licensee of Station KEWE(FM) (Channel 249A), Oroville, California, seeks the substitution of Channel 249B for Channel 249A and modification of its license accordingly (RM-5928). Southcom, Inc. (SI), licensee of Station KMGG(FM) (Channel 249A), Monte Rio, California, seeks the substitution of Channel 249B1 for Channel 249A and modification of its license to specify operation on the higher powered channel. Additionally, in order to accommodate its proposal at its present site, SI seeks two additional changes. First, it proposes that another Class A channel be substituted for Channel 249A at Fort Bragg, California,[1] and the construction permit issued to Station KSAY(FM) (Channel 249A), modified accordingly. Secondly, SI requests the substitution of Channel 249B1 rather than Channel 249B for Channel 249A at Oroville.[2]

2. The distance between proposed Channel 249B at Oroville [3] and the Monte Rio proposed use of Channel 249B1 at the preferred site of Station KMGG(FM)[4] is 163 kilometers whereas 211 kilometers is required between Class B-B1 co- channels. Thus, the petitioners may wish to consider the use of different sites to negate the 48 kilometer deficiency, thereby providing the opportunity for improved service to each, rather than accommodating only one proposal. In this regard, a staff engineering analysis has determined that Channel 249B can be allotted to Oroville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located 20.7 kilometers (12.8 miles) east of the community.[5] Channel 249B1 can be accommodated at Monte Rio from a site 20.3 kilometers (12.6 miles) southwest of the community.[6] Use of the latter site restriction at Monte Rio would also eliminate the need to substitute another Class A channel for Channel 249A at Fort Bragg, California,[7] and to modify the construction permit of Station KSAY(FM). Petitioners should advise us in their comments if our alternate proposal is acceptable.

3. In the event the petitioners are inflexible, we must consider their proposals on a comparative basis. Therefore, we shall provide each proponent an opportunity to provide comparative showings to assist us in our determination. *See , Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In this regard, the petitioners should supply the latest data available relevant to new areas to be served by their proposals, and the degree to which the gain areas can be comparatively weighed. The comparison should specify not only the size of the gain areas and populations therein, but other public interest matters as well. *See , Greenup, KY and Athens, OH*, 2 FCC Rcd 4319 (1987), *recon. pend.* In the event the modification proposals draw equal priorities, the more populous one will be preferred.

4. Since the modification requests at Oroville and Monte Rio propose to upgrade on the co-channel, we shall propose to modify those licenses pursuant to the provisions of Section 1.420(g) of the Commission's Rules without enter- taining other expressions of interest.

5. Additionally, in the event SI's modification proposal at Monte Rio is determined to be more beneficial to the public interest than that of ORI at Oroville, we shall also propose to modify the construction permit of Station KSAY(FM) (Channel 249A), Fort Bragg, California, to specify operation on Channel 253A.[8] In accordance with Commission policy, SI has expressed a willingness to reimburse Station KSAY(FM) for the necessary costs incurred in changing frequencies.

6. In view of the fact that the proposals herein could provide a first wide coverage area FM service to either Oroville or Monte Rio, California, the Commission believes it is appropriate to elicit comments on the alternate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Oroville, California	249A or	249B
Fort Bragg, California	237A,244A, 249A	237A,244A, 253A
Monte Rio, California	249A	249B1

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Wade Axell, licensee of Station KSAY(FM),[9] Fort Bragg, California, SHALL SHOW CAUSE why his license should not be modified to specify operation on Channel 253A in lieu of Channel 249A, in the event Channel 249B1 is substituted for Channel 249A at Monte Rio, California.

8. Pursuant to Section 1.87 of the Commission's Rules, Wade Axell may, not later than **July 1, 1988,** file a written statement showing with particularity why his license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Wade Axell, to furnish additional information. If Wade Axell raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the

modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Wade Axell will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Wade Axell, 18719 Meadowland Court, Penn Valley, California 95946.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **July 1, 1988,** and reply comments on or before **July 18, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Julian P. Freret. Esq. Booth, Freret & Imlay 1920 N St., NW, Suite 520 Washington, D.C. 20036 (Counsel for Oroville Radio, Inc.)	John Joseph McVeigh, Esq. Fisher, Wayland, Cooper and Leader 1255 - 23d Street, NW, Suite 800 Washington, D.C. 20037 (Counsel for Southcom, Inc.)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided, and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] In this regard, SI advises that at least eleven other Class A channels are available at the present site of Station KSAY(FM) as substitute for Channel 249A at Fort Bragg. Of those suggested by SI, we have chosen Channel 253A since it is the nearest available frequency to the present operation of Station KSAY.

[2] SI's engineering report offers that if Channel 249B1 is considered at Oroville in lieu of Channel 249B, the conflict with its proposal could be eliminated, provided a site 13 kilometers northeast of Oroville is used. (Reference coordinates provided by SI for Channel 249B1 at Oroville are 39-34-17 and 121-25-20.) However, since ORI did not express an interest in a Class B1 allotment in its petition, we will not propose it herein. Rather, if ORI determines that a Class B1 channel is a satisfactory alternative, it may advise us in its comments.

[3] Although no site restriction is required to accommodate proposed Channel 249B at Oroville, it cannot be used at petitioner's present site without impinging on Station KWIN(FM) (Channel 249A), Lodi, California (156 kilometers actual distance vs. 163 kilometers required). Rather, the required spacings are met based upon use of the following reference coordinates: 39-30-31; 121-32-46.

[4] Reference coordinates at the construction permit site of Station KMGG(FM) are 38-32-24 and 122-57-39.

[5] Reference coordinates utilized for this determination are 39-34-39 and 121-19-25.

[6] Reference coordinates at the restricted site are 38-19-14 and 123-08-58.

[7] The distance between SI's proposal at Monte Rio and the present site of Station KSAY(FM), at Fort Bragg is 124.2 kilometers, whereas a distance of 138 kilometers is required between Class A and B1 co- channels.

[8] Authority for this action is contained in Section 316 of the Communications Act of 1934, as amended.

[9] We note that an application to voluntarily assign the construction permit of Station KSAY(FM) from Axell Broadcasting Company to Wade Axell was granted September 22, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-193

In the Matter of

Amendment of Section 73.202(b), RM-6158
Table of Allotments,
FM Broadcast Stations.
(Philadelphia, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Quail Communications (petitioner), requesting the allocation of FM Channel 277A[1] at Philadelphia, Mississippi, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 281A can be allocated to Philadelphia, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules.[2]

3. In view of the fact that the proposed allocation could provide a second broadcast service to Philadelphia, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Philadelphia, Mississippi	272A	272A, 281A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 1, 1988,** and reply comments on or before **July 18, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mike Partridge
Quail Communications
P.O. Box 5314
Meridian, Mississippi 39302

Larry G. Fuss
Contemporary Communications
P.O. Box 3340
Meridian, Mississippi 39303
(Consultant to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision or approval is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner originally requested allotment of Channel 277A. However, to avoid a conflict with a proposed upgrade for Station WQIC, Marion, Mississippi, from Channel 276A to 277C2, we have substituted Channel 281A.

[2] The coordinates used for this proposal are 32-46-18 and 89-06-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-194

In the Matter of

Amendment of Section 73.202(b), RM-6315
Table of Allotments,
FM Broadcast Stations.
(Hertford, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Maranatha Broadcasting Company, Inc. (petitioner) requesting the substitution of Channel 285C2 for Channel 285A at Hertford, North Carolina, and the modification of its permit for Station WELQ(FM) to specify operation on the higher powered channel. Petitioner states that the substitution of channels would serve the public interest by permitting a more efficient use of the spectrum and by providing the public with enhanced radio service.

2. Channel 285C2 can be allocated to Hertford in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.0 kilometers (3.1 miles) south to avoid a short-spacing to Station WXRI, Channel 287B, Norfolk, Virginia.[1] In addition, allocation of Channel 285C2 to Hertford is contingent upon Station WMSQ at Havelock, North Carolina, modifying its facilities to specify Channel 286C2, pursuant to the Commission's *Report and Order* in MM Docket 86-65, 2 FCC Rcd 3319 (1987).[2]

3. We believe the public interest would be served by proposing the substitution of Channel 285C2 for Channel 285A at Hertford since it could provide the community with expanded radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hertford, North Carolina	285A	285C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 1, 1988,** and reply comments on or before **July 18, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Geoffrey Bentley, Esq.
Geraldine M. Carr, Esq.
Birch, Horton, Bittner, Pestinger & Anderson
1155 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 36-08-42 and West Longitude 76-28-20.

[2] The modification of Station WMSQ to specify Channel 286C2 is conditioned upon the outcome of the pending request to the Court of Appeals for the District of Columbia Circuit filed by Marine Broadcasting Corporation to review the Commission's decision denying the substitution of Channel 287C2 for Channel 288A at Jacksonville and the substitution of Docket 84-231 channels at Fairbluff and Wilmington, North Carolina. *Marine Broadcating Corp. v. FCC* and USA, Case No. 86-1536. However, Marine will seek dismissal of this appeal if the Commission grants its pending proposal to allocate Channel 262C1 to Jacksonville and modify Station WMSQ's license to specify operation on Channel 222C2 in lieu of its present Chanel 288A. *See* , MM Docket 88-40, 3 FCC Rcd 892 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PLAN TO OFFER COMPARABLY EFFICIENT INTERCONNECTION FOR GATEWAY SERVICES

Adopted: May 2, 1988; Released: May 10, 1988

On April 20, 1988, BellSouth's operating companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a Comparably Efficient Interconnection (CEI) plan to provide gateway services. According to BellSouth, the gateway services will allow customers to obtain local and national information services through the existing local exchange access network. BellSouth states that the gateway services will provide (1) on-line, helpful directions to various information services, (2) listings of service providers, (3) flexible billing options for information service providers, (4) network security features to encourage even casual use, and (5) storage capacity for information service providers offerings. BellSouth also proposes an expansion of the gateway services that will provide electronic mail and computer storage capacity for information service providers.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, FCC 88-9 (released Feb. 18, 1988)), the Commission must approve BellSouth's CEI plan before BellSouth can begin implementing it.

BellSouth states that it will account for the joint and common costs of the gateway services pursuant to its Part 32 cost allocation manual that the Commission conditionally approved (3 FCC Rcd 128 (1988)) pursuant to the *Joint Cost Order* (2 FCC Rcd 1298 (1987)). BellSouth also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on BellSouth's plan by **June 6, 1988,** and reply comments by **June 21, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of BellSouth's CEI plan can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-138

In the Matter of

Inquiry Into the Availability of
Broadcast Television Signals on
Cable Television Systems

NOTICE OF INQUIRY

Adopted: March 24, 1988; Released: May 10, 1988

By the Commission:

INTRODUCTION

1. By this action, the Commission requests data, empirical studies, and other information concerning the availability of broadcast signals on cable television systems. This information is needed to provide a basis for the formulation of regulatory policies to ensure a market structure that will facilitate competition between broadcast television and cable television services. In conjunction with signal carriage information we also seek information on any specific harms that broadcast stations may have experienced as a result of not being carried on a cable system within their service area or of channel repositioning, that is, carriage of a broadcast signal by cable systems on a channel other than that on which it broadcasts over-the- air. We are limiting this proceeding to the collection of a factual record and do not intend to consider or evaluate specific policy issues, positions, or options within this proceeding.

BACKGROUND

2. This Commission has long been concerned about the competitive relationship between broadcast television stations and cable television systems and its effect on the public interest.[1] One of the most important elements in this relationship is the ability of cable subscribers to access diverse services, including broadcast television stations that are available off-the-air in their local areas. In the past, we have addressed this issue through rules requiring cable television systems to carry all local television signals.[2] These rules were ruled constitutionally infirm and, consequently, invalidated by the U.S. Court of Appeals for the District of Columbia on July 19, 1985 in *Quincy Cable TV Inc. v. FCC*, 768 F. 2d 1434 (D.C. Cir. 1985). More recently, in Docket No. 85-349, we have attempted to implement policies intended to eliminate the need for mandatory signal carriage regulations by informing cable subscribers of the need for maintaining independent access to broadcast signals through an antenna and assisting them in obtaining this capability.[3] As part of this action, we adopted interim rules requiring carriage of broadcast signals by cable systems that were to expire at the end of a five year transition period.

3. On December 11, 1987, the U.S. Court of Appeals for the District of Columbia Circuit, in *Century Communications v. FCC*, No. 86-1683, slip op. (D.C. Cir., December 11, 1987), invalidated the interim must carry rules adopted pursuant to Docket No. 85-349 on the grounds that they were incompatible with cable operators' First Amendment rights.[4] The court held that the Commission had not demonstrated that the interim must carry rules furthered a substantial governmental interest so as to justify an incidental burden on First Amendment interests under the test set forth in *United States v. O' Brien*, 391 U.S. 367 (1968). Specifically, the court noted the absence of adequate empirical evidence to support the need for interim must carry rules and the five year length of the transition period.

4. Following the court's decision in *Century*, in a joint letter of February 19, 1988 from Senators Hollings and Inouye and Congressmen Dingell and Markey, the Commission was requested to commence a formal data collection program relating to the carriage of local television broadcast signals by cable systems and to provide them with an initial report on this matter by September 1, 1988.[5]

DISCUSSION

5. The question of the impact of cable TV systems on broadcast TV stations is one of the most important mass media issues facing the Commission. The policy issues involving access to broadcast signals by cable subscribers have always been made more difficult to resolve because of a paucity of empirical evidence. The significance of these difficulties for the achievement of our policy goals is manifested most plainly in the rulings of the court in both *Quincy* and *Century*. It is clear that we need more extensive empirical data and analyses describing patterns of cable system signal carriage practices and any adverse impact such practices may have on the service provided by the broadcast television industry to support the development and implementation of policy in this area.

6. Accordingly, we seek empirical data, information, and studies relating to the carriage of broadcast television stations by cable systems and any adverse effects on broadcast stations' audiences, revenues and service to the public that may result from lack of carriage on a local cable system or from repositioning of broadcast signals by cable systems. We are particularly interested in changes in signal carriage practices that may have occurred since the *Quincy* decision on July 19, 1985. We desire information to determine whether signals that were carried under the must carry rules are no longer available on cable systems. We also solicit coment on the extent to which consumers have taken steps to acquire the capability to receive signals independent of their cable service and the costs involved therein. We also are interested in whether cable systems have begun carriage of additional off- the-air signals and, if so, the extent to which they have substituted various alternatives for former must carry signals. Our signal carriage inquiry focuses on two major areas: 1) whether television stations that would have been entitled to signal carriage rights on cable systems under the must carry rules in effect prior to *Quincy* (*i. e.* July 19, 1985) are not carried now on those cable systems and why; and,

2) whether cable systems now carry former must carry signals on channels other than the channel on which they are available over-the-air.

7. With respect to the issue of whether signals that would be entitled to carriage on cable systems under the must carry rules in effect prior to July 19, 1985,[6] are not now being carried, we request interested parties to submit data and studies concerning the following:

1. The number of cable systems that have dropped individual broadcast signals that would be required to be carried under the former rules.

2. The type of such stations that have been dropped, *i.e.* commercial or noncommercial, UHF or VHF, network affiliated or independent.

3. For any cable systems that have dropped individual broadcast signals that were formerly required to be carried, the number of subscribers, the number of usable channels, the percentage of the broadcast signals' potential audience that subscribes to the system, the amount of local advertising appearing on the system, and the number and type (commercial or noncommercial, UHF or VHF, network affiliated or independent) of broadcast signals remaining on the system.

4. The nature of the programming that has been substituted by cable systems for each such dropped signal.

5. For stations that commenced operation after *Quincy and would have been entitled to carriage on cable systems under the former must carry rules, the same information specified in 1, 2, and 3 above for dropped signals or signals never carried.$added* individual signals that would have been required to be carried, the types of signals added, the number of subscribers, the number of usable channels, the percentage of the broadcast signals' potential audience that are subscribers to the system, and the number and type (commercial or noncommercial, UHF or VHF, network affiliated or independent) of other broadcast signals on the system.

In order to better understand the implications of specific cable signal carriage practices on the the television service available to the viewing public, we also are interested in the reasons that cable systems have dropped or added these signals. Further, we seek information on the extent to which broadcast stations that were formerly required to be carried now pay for carriage or have been dropped or denied carriage for refusal to pay. Finally, with respect to those situations where a cable system proposed not to carry a signal but ultimately carried the signal, we seek information on the reasons for such carriage.

8. With respect to signals entitled to carriage on cable systems under the former must carry rules, which also generally required that those signals be carried on the same channel as they broadcast on over-the-air,[7] we seek information on the following:

1. The number of cable systems that have repositioned individual broadcast signals and whether repositioning has been off the basic tier or to a position where an additional converter is required to recieve the signal on additional cable installations

2. The type of stations that have been repositioned, *i. e.* commercial or noncommercial, UHF or VHF, network affiliated or independent. The number of times each station has been repositioned.

3. For those cable systems that have repositioned individual broadcast signals, the number of subscribers, the percentage of the broadcast signals' potential audience that subscribes to the system and the number and type (commercial or noncommercial, UHF or VHF, network affiliated or independent) of broadcast signals carried on the system.

4. The nature of the programming that has been inserted on the channel on which the repositioned signals were formerly carried.

5. For stations that commenced operation after *Quincy* and would have been entitled to on-channel carriage on cable systems under the former must carry rules, the same kinds of information requested in 1, 2, and 3 above for repositioned signals.

We also seek information on the reasons cable systems reposition signals. We further ask that parties indicate situations where a station has requested to be repositioned. Where a change in position has been proposed but not implemented, we seek information on the reasons therefor. Also, we seek information on the extent to which broadcast stations have negotiated agreements involving compensation with cable operators for carriage on channel.

9. Interested parties are asked to submit any information which will shed empirical light on the subjects addressed herein. We also specifically invite the submission of independent studies of broadcast signal availability to cable subscribers and analyses of the causes and trends in cable system behavior in this area and in cable subscriber efforts to maintain independent access to broadcast signals in their local areas.

10. Finally, we seek information regarding any specific adverse effects broadcast stations may have experienced as a result of cable system signal carriage practices. Generally, such effects would be expected to occur through diminished audiences and associated losses in revenues. We ask that parties commenting in this regard provide specific information: the percentage of stations' total audience lost as a result of the dropping, refusing to carry, or repositioning of their signal by individual cable systems and the effects of those audience losses on their revenues. In this regard, we are interested in whether the potential for non-carriage or channel repositioning has impaired a broadcast station's ability to raise capital. Moreover, for noncommercial stations we are interested in determining the potential amount of lost revenue due to non-carriage. We also invite the submission of generalized studies examining patterns of effects of cable systems' actual broadcast signal carriage practices on the economics of broadcast station operation.

PROCEDURAL MATTERS

11. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 8, 1988,** and reply comments on or before **August 8, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file

formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

12. This Notice of Inquiry is issued pursuant to authority contained in Sections 4(i), 303, and 521 of the Communications Act of 1934, as amended.

13. For further information concerning this proceeding, contact Scott Roberts, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] *See , e. g., Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff' d sub. nom. Carter Mountain Corp. v. FCC*, 321 F. 2d 359 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 951 (1963); *Cable Television Report and Order*, 36 FCC 2d 148 (1972); and *Report on the Economic Relationship Between Television Broadcasting and CATV*, 71 FCC 2d 632 (1979).

[2] *See supra* fn. 1.

[3] *See Report and Order* in MM Docket No. 85-349, 1 FCC Rcd 864 (1986) and *Memorandum Opinion and Order* in MM Docket No. 85-349, 2 FCC Rcd 3593 (1987).

[4] *Century Communications v. FCC*, No. 86-1683, slip op. (D.C. Cir., December 11, 1987). In response to a Motion for Clarification of the *Century* decision filed by the Commission, the court issued an Ord er, No. 86-1683, slip op. (D.C. Cir., January 29, 1988) clarifying that its decision in *Century* did not invalidate the input selector switch and consumer education rules that were also adopted pursuant to Docket No. 85-349. On February 22, 1988, the court recalled its mandate in response to a petition for rehearing as to the issues addressed by the court in its clarification. *Order*, No. 86-1683, slip op. (D.C. Cir., February 22, 1988). On April 8, 1988, the court denied the petition for rehearing of the clarification order and vacated its February 22, 1988, recall of the mandate. The *Century* decision has been appealed to the Supreme court.

[5] The Commission has initiated a separate data collection project that will complement this inquiry and comply with some of the elements of this request.

[6] The broadcast television signals that would be entitled to carriage rights on cable systems under the must carry rules that were in effect prior to July, 19, 1985, are the same as those specified as part of basic cable service under Section 76.5(ii) of the current rules.

[7] *See*, 47 CFR §76.55(a)(2) (1985) *(invalidated by Quincy)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-184

In the Matter of

Amendment of Section 73.202(b), RM-5635
Table of Allotments,
FM Broadcast Stations.
(Monticello, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1988; Released: May 10, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* herein, 2 FCC Rcd 3484 (1987), issued in response to a petition filed on behalf of Craig T. Dale (petitioner), proposing the allotment of Channel 260A to Monticello, Arkansas, as that community's second local FM service. Supporting comments were filed by petitioner reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 260A to Monticello since it could provide an additional local FM broadcast service to the community for the expression of diverse viewpoints and programming.

3. As indicated in the *Notice, Channel 260A can be allotted to Monticello in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.*[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the

City	Channel No.
Monticello, Arkansas	228A,260A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 260A at Monticello, Arkansas, will open on **June 21, 1988,** and close on **July 21, 1988.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates utilized for Channel 260A at Monticello are 33-37-42 and 91-47-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone &
Telegraph

Plan for the Provision of
Transaction Services

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1988; Released: May 11, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 26, 1987, pursuant to the requirements of the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan (the Plan) for the provision of its Transaction Services offering, an enhanced service that allows merchants at points of sale to interact with the computers used by merchant credit processors to process sales, credit, debit, or check transactions, or other transactions requiring authorization. We requested public comment on the Plan. Six parties filed comments or oppositions, and five parties filed reply comments.[2] In this order, pursuant to the authority delegated to us by the Commission, [3] we approve the Plan, subject to the conditions discussed below.

II. BACKGROUND

2. Under the requirements of the *Phase I* orders in *Computer III*, AT&T may offer a specific enhanced service, or class of services, on an unseparated basis only after it submits to the Commission, and obtains approval of, a plan that satisfies the Commission's CEI requirements, as well as other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[4] Under CEI, carriers must provide interconnection opportunities to others on the basis of an "equal access" standard to insure that basic facilities are available to other enhanced service providers and users on an unbundled and functionally equal basis.[5] We use that standard to review plan compliance with the CEI parameters concerning interface functionality; unbundling of basic services: resale; technical characteristics; installation, maintenance, and repair; end-user access; CEI availability; minimization of transmission costs; and recipients of CEI.[6]

III. SERVICE DESCRIPTION

3. In the Plan, AT&T describes its Transaction Services offering as a computer-based enhanced service that allows merchants using point-of-sale terminals to interact with the computers used by financial service institutions (*e. g.*, banks and credit card companies) and other merchant credit processers to process sale, credit, debit, or check transactions, or other transactions requiring authorization. The customers of Transaction Services are those financial service institutions and credit processors. It states that many other vendors currently offer similar, competing services. AT&T notes that it presently offers Transaction Services on a noncollocated basis, pursuant to the *AT & T Limited Waiver Order*.[7] It proposes to place in AT&T central offices the identical equipment that it now uses to provide the service externally, thereby eliminating the need for local access lines between Transaction Services and AT&T central offices without otherwise changing the way in which it provides the service.[8] AT&T claims that this would reduce the costs and increase the efficiency of providing the service.[9]

4. AT&T states in the Plan that local access between point-of-sale terminals and Transaction Services equipment is performed today, and will continue to be done, through switched or special access provided by local exchange carriers (LECs).[10] Customers, *i. e.*, the financial institutions and credit processors, may also choose to provide their own local access or order access directly from AT&T.[11] The point-of-sale terminals typically transmit transactional information in an asynchronous format to an AT&T Transaction Services access point. When a point-of-sale terminal is not within the same local calling area as a Transaction Services access point, such a terminal can obtain access to Transaction Services "via 800 service or other means.[12] Access points will "transparently communicate in an asynchronous mode,[13] using Dataphone Digital Service (DDS) or voice grade lines,[14] with a Transaction Services node that is equipped to perform protocol conversion and packet assembly and disassembly (PAD) functions.[15]

5. As customer options, Transaction Services also can validate incoming messages by transaction amount, card expiration date, and account number; generate a "denial" message to the point-of-sale terminal without intervention by a customer's host computer; and route the message automatically to an alternate host computer.[16] Thus, Transaction Services is able to resolve many transactions without use of the customer's host computer. When Transaction Services is not able or is not authorized to generate a dispositive response to the point-of-sale terminal on its own, it will relay the message to the customer's host computer via AT&T's Accunet Packet Service (APS), in conjunction with DDS or voice grade service in some instances.[17] AT&T describes APS as a common user network service that employs packet switching technology to transport data packets at 2.4, 4.8, 9.6, and 56 kilobit-per-second (kbps) speeds.[18] The customer's host computer would transmit a response to the point-of-sale information it receives through the same services and equipment described above, with Transaction Services equipment performing the necessary protocol conversions and PAD functions.[19] AT&T implies, but does not explicitly state, that customers' host computers will perform their own PAD functions and communicate directly with APS in the protocol that APS itself uses.[20]

IV. COMPLIANCE ISSUES

A. CEI Requirements

6. The CEI requirements are designed to give enhanced service providers equal and efficient access to those basic services that AT&T and the BOCs would use in providing their own enhanced services. The *Phase I Reconsideration Order* emphasized that the standard for evaluating CEI compliance is based on "equal access," which will be interpreted in a "reasonable and efficiency-promoting manner."[21] The standard does not require absolute technical equality, but rather seeks to achieve fairness and efficiency for all enhanced service providers competing with a carrier. Factors used to evaluate whether the standard has been met include the absence of systematic differences between basic service access provided to the carrier's enhanced service operations and to others, end-user perception of equality, and utility to other enhanced service providers –that is, whether any technical disparity makes a difference in the ability of competitors to provide their enhanced services.[22]

1. Proposed CEI Arrangements

7. AT&T states that the basic services it will offer to fulfill its CEI obligations for Transaction Services are APS, DDS, and voice grade services.[23] AT&T states that Transaction Services will be charged the full, tariffed rates for APS, DDS, voice grade services, and any other such private line service components that are required to process transactions. These charges, it says, are identical to the charges applicable to all customers that interconnect to the basic services used by Transaction Services.[24] AT&T further states that interconnection between Transaction Services and APS (or DDS or voice grade service where APS is unavailable) will be provided through standard interfaces with technical characteristics that already are well-known to the industry.[25]

2. CEI Parameters

8. The CEI parameters seek to ensure that the basic services used by a carrier's enhanced service are available to other enhanced service providers in an equally efficient manner. The Commission took care to develop the parameters so that the carriers subject to those requirements could satisfy them in a flexible manner, consonant with the particular services at issue.[26] We discuss specific parameters below.

a. *Interface Functionality*

9. As part of its CEI offering, the carrier must provide standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those utilized in its own enhanced service offering, with information and technical specifications for such interfaces subject to the Commission's network information disclosure requirements.[27]

(1) *Positions of the Parties*

10. AT&T argues that the Plan conforms to the interface functionality requirement because, when it is collocated, Transaction Services will access AT&T's basic APS service through a standard X.25 interface.[28] Similarly, AT&T claims, when Transaction Services uses DDS or voice grade services to reach the nearest AT&T central office where APS is available, it will use interfaces to such services that are also standard and available to all users. AT&T contends that all of these interfaces are identical to the interfaces now used by its externally provided service, and are described in publicly available technical publications.[29] Transaction Services, says AT&T, will not be provided any additional or different functionalities not specified in AT&T's tariffs.[30] No other parties commented on this provision.

(2) *Discussion*

11. No party challenges AT&T's claims in relation to this CEI parameter, and our own examination of AT&T's plans for interface functionality indicates that those plans comply with the CEI rules. We therefore approve this section of the Plan.

b. Unbundling of Basic Services and Resale of Basic Services

12. The *Phase I Order* established a CEI requirement that the basic services and basic service functions that underlie an enhanced service offering of AT&T or a BOC must be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff.[31] As noted in the *Phase I Order*, if a carrier uses a set of basic functions in providing an enhanced service, CEI for that service must include that set of functions unbundled from all other basic offerings.

13. In addition, the Commission required the enhanced service operations of AT&T and the BOCs to take the basic services used in their offerings at their unbundled tariffed rates.[32] In the *Phase II Order*, the Commission clarified how this "resale" or "transmission at tariff" principle would apply to protocol processing.[33] The Commission adopted the conditions of the *Asynchronous / X. 25 Waiver Order* [34] for all forms of protocol processing offered by the BOCs.[35] Those conditions include, *inter alia*, a requirement that tariffed rates be applied to the interoffice channels related to the provision of packet service whether used by the BOCs or by value-added networks (VANs).[36] However, the Commission also distinguished the BOCs from AT&T and stated, "Inasmuch as the BOC CEI requirements were designed primarily for carriers that provide local exchange service, the requirements must be adapted to fit AT&T."[37]

14. The Commission described the protocol processing CEI requirements for AT&T as follows:[38]

> Accordingly, we will require AT&T to provide to others, on a nondiscriminatory basis, the digital transmission services and facilities that underlie its enhanced services that use protocol processing. We require AT&T to take such services that it uses for its own enhanced services at the standard tariffed rates it charges to others.

15. The Commission adopted the *Phase II Order* shortly after it adopted the *Transmittal 474 Order*, which affirmed a Common Carrier Bureau order that denied petitions to reject or suspend an AT&T tariff for APS service.[39] The APS tariff rate included interoffice channels and packet switching. IBM contended in that proceeding "that the Bureau erred in accepting the tariff because Commission precedent requires underlying transmission lines to be priced at tariffed rates."[40] The Commission said, "We do

not agree with IBM's claim that Commission precedent requires underlying transmission lines to be accounted for at tariffed rates."[41]

(1) *Positions of the Parties*

16. AT&T states that no special CEI tariff is needed to make the basic services underlying Transaction Services available to other enhanced service providers on the same terms and conditions.[42] AT&T further states that, when Transaction Services equipment is collocated with its basic switching offices, AT&T will take APS or, where connection with APS is unavailable or infeasible, DDS or voice grade service, at full tariffed rates, just as it does now.[43] In particular, AT&T indicates that Transaction Services will pay the same tariffed charges for connections at the central office, and for other rate elements that it now incurs on an external, noncollocated basis, that any enhanced service provider not affiliated with AT&T would be required to pay.[44] Thus, claims AT&T, the tariff charges incurred by its Transaction Services offering for AT&T basic services will be identical to the charges that would be incurred by a competing enhanced service provider that chooses to provide a comparable enhanced service using AT&T's basic services.[45]

17. IBM claims that the Plan fails to satisfy the *Computer III* requirements because AT&T is proposing to provide its competitors with access to APS, which combines packet switching and DDS, rather than offering "unembellished" DDS trunks to others at the same price that is charged to APS. IBM states that enhanced service providers that are not affiliated with AT&T generally prefer to lease DDS trunks and add their own nodes to perform protocol conversion and packet switching.[46] IBM contends that the reasoning of the *Asynchronous / X. 25 Waiver Order*, which required BOC enhanced services to obtain interoffice data trunks at tariffed rates, applies equally to AT&T as well.[47] IBM construes the *Phase I Order* as continuing to apply the transmission-at-tariff requirement to the BOCs and also extending it to AT&T.[48] IBM contends that conclusion was reaffirmed in the *Phase I Reconsideration Order* and the *Phase II Order*.[49] It claims that AT&T, in the *Transmittal 474* proceeding, "was quick to draw a distinction between the use of embedded trunk costs in basic as opposed to enhanced services, arguing that the transmission-at-tariff principle applies only where the carrier 'combines' a basic and an enhanced service."[50] IBM contends that, since AT&T is now proposing to combine a basic and an enhanced service by collocating Transaction Services with APS, the rationale AT&T proffered to justify excusing APS from the transmission-at-tariff requirement is no longer applicable.[51]

18. Telenet argues that AT&T's APS service does not meet the requirements of the *Asynchronous / X. 25 Waiver Order* that it says the Commission incorporated into the *Computer III* requirements.[52] Telenet maintains that, under those requirements, APS should be taking interoffice DDS facilities at tariffed rates, but instead the Commission has accepted a tariff that allows AT&T to fold DDS into APS at its embedded costs, which Telenet says are 40 percent lower than the tariffed rates charged to unaffiliated companies like Telenet for DDS channels.[53]

19. CCTU asserts that AT&T should be required to take DDS trunks used in APS at DDS tariffed rates because most enhanced service providers do not need packet services such as APS. APS is useless to competing enhanced service providers, says CCTU, because enhanced service providers customize their own networks to meet their customers' specialized needs; packet switching services supplied by AT&T are therefore superfluous to them and impede their ability to provide their own services in the most efficient manner possible.[54] CCTU argues that designation of APS as the basic service underlying Transaction Services encumbers enhanced service providers with additional services that they do not need and requires them to deliver their signals in the X.25 protocol, which often requires them to go through additional processing.[55] It contends that, unless APS is required to take DDS under tariff, AT&T will effectively place competing enhanced service providers in a price squeeze by using an embedded cost for the interoffice channels used in APS rather than the significantly higher tariffed rates charged to its competitors for the identical channels.[56]

20. The TSPs generally support the suggestions of other parties that AT&T be required to conform to a transmission-at-tariff standard for the DDS channels that underlie APS.[57]

21. In its reply comments, AT&T rejects suggestions that APS should be required to obtain its interoffice transmission circuits at tariffed rates. According to AT&T, the *Phase II Order* made clear that the *Asynchronous / X. 25* requirements apply to the BOCs, not to AT&T,[58] and in tariff proceedings the Commission has twice rejected IBM petitions that APS be required to take DDS under tariff.[59] AT&T argues that APS itself is the underlying basic service that Transaction Services will use,[60] and that under the *Phase I Order*, AT&T only must offer the basic services underlying an enhanced service " *as a set* unbundled from all other basic offerings."[61]

(2) *Discussion*

22. IBM's reliance upon the *Phase I Order* is misplaced. The requirements for protocol processing services in that order were described as interim "pending the resolution of the issues of the Supplemental Notice.[62] The protocol processing issues were resolved in the *Phase II Order*, which established four specific CEI requirements for the BOC protocol processing services based on the *Asynchronous / X. 25 Order*, including an obligation to apply to their own enhanced service operations the tariffed rates for the interoffice channels related to the provision of packet service.[63] In the next paragraph, however, the Commission distinguished AT&T and applied only a general nondiscrimination requirement to its enhanced services that include protocol processing. Thus, AT&T was simply required to provide to its competitors "the digital transmission services that underlie its enhanced services that use protocol processing" on the same terms and conditions that it supplies these services to itself.[64] In our view, the absence of a specific transmission-at-tariff requirement in the paragraph applying to AT&T demonstrates that the Commission did not intend to impose such requirement on AT&T's enhanced service offerings.[65]

23. APS is the principal "digital transmission service" that underlies Transaction Services. It is undisputed that AT&T makes APS available to its enhanced service competitors (or, for that matter, to any customer that wishes to purchase the service) at the same tariffed rates that it proposes to charge Transaction Services. Thus, on its face, AT&T's plan would appear to satisfy the CEI obligation established in the *Phase II Order* for its services that include protocol processing.

24. The prior proceedings relating to APS confirm that the *Phase II Order* should not be interpreted to require AT&T to use separately tariffed interoffice channels. This was the principal issue in the *Transmittal 474 Order*, which the Commission adopted a few weeks before adopting the *Phase II Order*. The Commission was clearly aware that the existing service AT&T had used for enhanced offerings would not comply with a requirement that tariffed rates be applied to interoffice channels that are used in connection with an AT&T packet or protocol service. If the Commission had chosen to impose such a requirement on AT&T, the Commission would have described the requirement in the same terms that it used in the preceding paragraph of the *Phase II Order* to describe the applicable BOC requirement. The Commission chose instead to describe the AT&T requirement in terms that are fully consistent with an AT&T decision to use APS for its own protocol processing services.

25. The *Phase II Reconsideration Order* did not modify or expand the AT&T requirements for its services that include protocol processing. The parties who object to AT&T's proposed use of APS apparently did not even seek reconsideration of the relevant portion of the Commission's decision. It would not be appropriate to permit persons who failed to seek such reconsideration to use implementation proceedings for particular CEI plans, such as this one, as a substitute for a timely reconsideration petition. Accordingly, we find that AT&T's proposed use of APS satisfies the relevant protocol processing requirements.

c. Technical Characteristics

26. The *Phase I Order* requires that, as part of its CEI offering to enhanced service competitors, AT&T must offer basic services with technical characteristics that are equal to those of the basic services it utilizes for its own enhanced services. These characteristics include, but are not limited to: transmission parameters, such as bandwidth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.[66] In the *Phase I Reconsideration*, the Commission stated that it intended to interpret this equal access standard in a "reasonable and efficiency-promoting manner."[67] It further stated that the standard "does not demand impossible or grossly inefficient over-engineering of the network so that absolute equality is always achieved," and it specifically recognized, and accepted as unavoidable, the fact that the signal level of an analog data connection will decrease to some extent with the loop distance from the central office.[68]

(1) *Positions of the Parties*

27. AT&T states that its collocated Transaction Services equipment will use its tariffed services – principally APS – with the same technical characteristics that will be offered to competing enhanced service providers. Moreover, it adds, Transaction Services will interconnect to AT&T basic services using standard interfaces currently used by the externally-provided AT&T Transaction Services and by other users of the underlying basic services.[69] These interfaces, says AT&T, require certain technical input values that are specified in AT&T technical publications and that are the same regardless of whether the signal originates outside or inside AT&T's central office premises. AT&T argues that, assuming that the access provider (usually a LEC) conveys to AT&T a signal that is within the specified parameters, there will be no technical inequality between the signals delivered to the network interfaces by AT&T's Transaction Services and unaffiliated enhanced service providers, regardless of the distance between the origin of the signal and the relevant AT&T central office.[70]

28. IDCMA maintains that, absent physical collocation, AT&T's competitors could encounter slower response times in validating the integrity of their completed circuits (*e. g.*, parity checks and cyclic redundancy checks). Slower response times, it argues, can translate into customer delays, reducing the competitiveness of the services involved.[71] IDCMA states that, if actual collocation is not feasible for technical reasons or because of lack of space, a competing enhanced service provider should be provided the opportunity to run a tie cable from the carrier's central office to its own equipment located in a separate building nearby.[72] Such an opportunity, it argues, would eliminate the possibility of "buck-passing," demonstrated by AT&T's assignment of the responsibility for access lines to the LECs.[73] In its reply, AT&T reasserts that the Commission has already declined to require collocation.[74]

(2) *Discussion*

29. While IDCMA has listed a number of potential technical disadvantages that it asserts could result if physical collocation is not required, it has not provided any information concerning the scope or frequency of those potential problems or otherwise demonstrated that they will be significant enough to affect end-user perceptions of quality under the configurations that AT&T proposes in the Plan.[75] The Commission has declined to mandate physical collocation as a general CEI requirement, and we decline to introduce a collocation requirement in the guise of ensuring technical equality.

30. We also decline to require AT&T to amend its Plan to accommodate IDCMA's proposed alternative to collocation. IDCMA does not make clear whether its alternative proposal would merely require AT&T to provide connections in its central offices to tie lines provided by unaffiliated enhanced service providers, or whether it would require AT&T to supply or pay for tie lines from its facilities to other, nearby locations. The first alternative requires no action by us because the Plan notes that AT&T's tariffs already provide that a user of AT&T's private line services may provide its own access or may order access directly from another supplier.[76] We reject the second alternative, requiring AT&T to pay for such access lines, because there is no basis for it in the Commission's *Computer III* orders. This approach would dissipate the economies that AT&T realizes from collocation by requiring that those savings be used to subsidize the transmission costs of noncollocated competitors. The Commission did not intend that, as the price of achieving the efficiencies of integrating enhanced services with its basic service operations, AT&T would be forced to pay for the access connections its competitors use to reach AT&T facilities. We conclude that, for this parameter, the Plan complies with the Commission's requirements.

d. Installation, Maintenance and Repair

31. Under the Commission's requirements, the time periods for installation, maintenance, and repair of the basic services and facilities included in a CEI offering must be the same as those the carrier provides to its own enhanced service operations.[77]

(1) *Positions of the Parties*

32. AT&T states that it will not deviate from its existing standards for the provisioning, maintenance, and repair of facilities and circuits, regardless of whether it provides the relevant basic services to its Transaction Services operations or to competing enhanced service providers. AT&T claims that its existing circuit and central office equipment assignment procedures are highly mechanized and are implemented on a non-discriminatory, first-come, first-served basis. These procedures, it says, provide AT&T personnel with no information as to whether a customer is an enhanced service provider or an AT&T enhanced service operation, and are completely neutral with respect to all aspects of basic service provisioning.[78] Moreover, it argues, the principal basic service used by Transaction Services, APS, is a common user service in which customers share switching functions and transmission circuits with other customers, rather than obtaining dedicated facilities. Consequently, it concludes, AT&T would be incapable of degrading the performance of APS provided to competing ESPs without at the same time degrading the service for other users, including its own Transaction Services offering.[79]

32. No other parties comment specifically on this requirement, except to the extent that they comment on the nondiscrimination reporting requirements, discussed in Section IV.A.4.c below.

(2) *Discussion.*

34. In the Plan, AT&T states that it will provide equal installation, maintenance, and repair for all customers, and describes the internal procedures it will employ to ensure compliance with this CEI parameter. These procedures appear to be nondiscriminatory, and no party has challenged them *per se*. As a practical matter, this requirement is an issue in this proceeding only in the context of nondiscrimination reporting, discussed below, in which AT&T must demonstrate that it is honoring its commitment to provide equal treatment.

e. End User Access

35. The *Phase I Order* states that, if a carrier offers end users such features as the ability to use abbreviated dialing or signalling to activate or access the carrier's enhanced offerings, it must provide, as part of its CEI offerings, the same capabilities to end users of all enhanced services that utilize the carrier's facilities. The order further states that end users should have equal opportunities to access basic facilities through derived channels, such as Data-Over-Voice (DOV) offerings, whether they use the enhanced service offerings of the carrier or those of a competitor.[80]

(1) *Positions of the Parties*

36. AT&T states that Transaction Services will use the "same tariffed services that would be utilized by any other user"[81] and that all service features and options available under tariff to AT&T's Transaction Services are also available under tariff to all other users on the same terms and conditions.[82] No other party comments on this section of the Plan.

(2) *Discussion*

37. We approve this part of the Plan because it demonstrates an undertaking by AT&T to provide to end users equal capabilities for activating or accessing the equipment of all enhanced service providers that use AT&T's basic service facilities.

f. CEI Availability

38. A carrier's CEI offerings must be fully operational and available on the date that it offers its corresponding enhanced service to the public. In addition, the carrier must specify a reasonable time prior to this date during which prospective users of CEI, such as enhanced service competitors, can utilize the CEI facilities and services for purposes of testing their enhanced service offerings.[83]

(1) *Positions of the Parties*

39. AT&T states that the CEI offerings proposed in the Plan will be operational and available on the same date that AT&T offers Transaction Services because APS, DDS, and voice grade service are already available.[84] It argues that the Commission's requirement for a reasonable testing period has been met because the underlying basic services are available for testing today.[85] As discussed in para. 52, *infra*, the AT&T reply states that AT&T intends to offer subrate multiplexing. AT&T subsequently filed a subrate multiplexing tariff, which became effective on March 20, 1988.[86] No other parties comment on this requirement.

(2) *Discussion*

40. We approve this part of the Plan because AT&T has offered to the public all of the CEI offerings that it describes or proposes in the Plan.

g. Minimization of Transmission Costs)

41. In the *Phase I Order*, the Commission recognized that carriers may reduce or eliminate certain equipment and transmission costs by collocating or integrating enhanced services facilities with their basic network facilities. While the Commission did not impose mandatory collocation requirements on carriers subject to CEI, it did require such carriers to provide others with interconnection facilities that minimize such transmission costs. It required that carrier CEI plans demonstrate the steps the carrier would take to reduce transmission costs for enhanced service competitors. The *Phase I Order* directed such carriers to develop techniques to minimize such costs.[87] The *Phase I Reconsideration Order* stated that the requirement that transmission costs be minimized focuses on technological methods, such as multiplexing, which reduce the extent of the local exchange facilities that an enhanced service provider requires for access to the carrier's network, rather than pricing for minimizing such costs.[88] The Commission further clarified that a CEI offering that is substantially identical to existing services need not be priced lower than those services simply for CEI purposes. Instead, the Commission encouraged the use of existing basic services in CEI in order to expedite initial CEI development.[89] The *Phase II Reconsideration Order* clarified that a carrier may satisfy this CEI requirement if the carrier charges itself an access link rate that is the same as that paid by non-collocated enhanced service providers, provided that the access connections in each case are equivalent in technical quality.[90] The Commission also stated that "the NURE

requirement and the requirement to minimize the costs of facilities from BOC end offices to VAN facilities do not apply to AT&T."[91]

(1) *Positions of the Parties*

42. In the Plan, AT&T argues that, in most cases, the transmission needed by enhanced service providers to reach AT&T's central office will require (1) local loops between the enhanced service provider's premises and a LEC serving wire center, and (2) trunks between the LEC serving wire center and the nearest AT&T central office. AT&T claims that those local loops and trunks, and their accompanying costs, are outside of its control because these transmission facilities are controlled by the LECs.[92] AT&T states that it has already done what it can to help minimize local transmission costs by providing enhanced service providers with a tariffed multiplexing function, thereby enabling its competitors to access AT&T's central offices through the use of high capacity (1.5 megabits-per-second (mbps)) channels that are available at lower unit costs per channel.[93]

43. A number of parties advocate that AT&T provide physical collocation, or some form of averaged pricing (commonly referred to as "virtual collocation), to enhanced service providers in order to minimize costs. For example, AHTUC argues that AT&T has failed to do all it can to minimize the transmission costs that other enhanced service providers will have to incur to use the AT&T tariffed basic services which AT&T proposes to use for Transaction Services.[94] AT&T "could have taken decisive and important steps to minimize competitors' transport costs to APS by allowing for direct, dial-up access to its APS and DDS facilities," argues AHTUC.[95] It notes that, because AT&T does not offer dial-up access to APS and DDS, both AT&T and its enhanced service competitors must provide dial-up access to their customers by means of their own local processors, which customers access through the public switched network.[96] While AT&T will be able to link its Transaction Services processors to APS or DDS by means of hardwired, intra- building connections, says AHTUC, competing firms will have to obtain special access facilities from a LEC to transmit the data from their processors to the APS node.[97] While AHTUC agrees that AT&T has no control over the price or availability of special access facilities provided by LECs, it argues that AT&T has an obligation to minimize such costs by enabling its enhanced service competitors to avoid the need for such facilities, that is, by equipping APS to accept direct dial-up access and, where APS is not available, to equip DDS to accept such access.[98] It further argues that such access must be priced at a level that is consistent with the cost-minimization requirement.[99] AHTUC states that, to the extent such an offering would involve some protocol processing, AT&T could request waivers to provide this capability as part of APS.[100]

44. AHTUC further argues that AT&T should (a) "either be required to obtain an access line (albeit at zero mileage) from a LEC or (b) provide similar hardwire facilities to other enhanced service providers who locate sufficiently proximate to [APS] nodes to make such connections feasible."[101] If, however, the Commission does not mandate the availability of such connections, says AHTUC, it should require that AT&T charge Transaction Services the fair market value of the hardwire connections that it will use, not merely their cost.[102]

45. The TSPs argue that the principal purpose of the Plan is to gain for AT&T a substantial cost advantage over competing providers of transaction processing services by permitting AT&T to collocate Transaction Services in its central offices while denying that privilege to others. The TSPs contend that any efficiencies that AT&T would thereby enjoy are outweighed by the discriminatory effect of the Plan and its inconsistency with the letter and spirit of *Computer III*.[103] The TSPs construe the Plan as proposing not to charge AT&T Transaction Services anything for transport between collocated Transaction Services and basic service equipment inside AT&T's central offices; by contrast, they say, the DDS lines that are commonly used to transport authorization requests to AT&T from the noncollocated nodes into which merchants call authorization requests cost $400-500 per month.[104] As a percentage of the overall costs of operating an electronic transaction processing service, the resulting advantage for AT&T over its competitors could be between 8 percent and 50 percent, based on figures cited by the TSPs.[105]

46. Moreover, say the TSPs, it would be naive to conclude that the economies realized by AT&T's Transaction Services will be limited to transmission: the TSPs cite the General Accounting Office's conclusion, drawn "even before AT&T submitted its cost accounting manual," that the Commission's joint cost allocation rules cannot "'ultimately provide telephone ratepayers or carrier competitors positive assurance that [the] FCC's joint cost rules will guard against cross-subsidy.'"[106] The TSPs say the appropriate remedy is to require AT&T to offer collocation or "virtual collocation" to its competitors.[107] Under the virtual collocation regime suggested by the TSPs, AT&T would be required to procure or supply local links to Transaction Services competitors located within a specified radius of its central offices,[108] a service that the TSPs say AT&T is already providing in connection with other services.[109]

47. The TSPs contend that the 1.5 mbps multiplexing that AT&T mentions in the Plan is often useless in transactions processing because the lines into a carrier's central office are usually voice grade private lines or 56 kbps DDS circuits.[110] The TSPs add that subrate multiplexing would be valuable to transactions processors but is not generally offered by AT&T.[111] However, in an *ex parte* presentation, the TSPs qualified their support of subrate multiplexing, stating that it would reduce costs only in areas that do not generate enough transactions to justify installation of one or more 56 kbps private lines.[112] The TSPs state that AHTUC's proposal to require AT&T to provide dial-up access to APS is a good one, but they add that it would eliminate only a small portion of AT&T's competitors' local transmission costs because, they say, savings would only be realized in low volume areas where enhanced service providers would otherwise use Wide Area Telephone Service (WATS) or foreign exchange (FX) lines to collect and transport authorization requests to processing centers at distant locations.[113] Even in those situations, the TSPs contend, only a portion of the comparative disadvantage to competing enhanced service providers would be eliminated, because these competitors would still have to buy access links between AT&T and their processing centers that AT&T would totally avoid under the Plan.[114]

48. Telenet argues that AT&T has failed to minimize its competitors' transmission costs because it has not offered to provide virtual collocation, that is, to charge Transac-

tion Services a surrogate rate for the transmission costs that competitors incur to access AT&T's central offices.[115] The fact that such local access services are more often provided by LECs than by AT&T does not diminish the case for virtual collocation through assigning to AT&T's collocated enhanced service a "cost" for local access, says Telenet.[116] Telenet suggests that such a surrogate might be based upon the costs currently experienced by AT&T to access its central offices from its non-collocated Transaction Services nodes, or it could be the rate taken from the relevant LEC tariff for a minimum-length digital private line connected to the AT&T central office.[117]

49. CCTU asserts that AT&T has not even attempted to minimize its competitors' transmission costs[118] and suggests that it be required to do so, either by allowing competitors to collocate[119] or by providing direct, dial- up access to its APS and DDS facilities.[120] CCTU notes that several BOCs are currently permitting collocation.[121] It further states that its experience negotiating collocation contracts in France indicates that collocation provides a unique profit opportunity for dominant carriers.[122] Where space does not permit actual collocation, says CCTU, AT&T should apply the same access charge to itself and others, provided that the unaffiliated services are located within three to five miles of the AT&T central office involved.[123]

50. IDCMA argues that we should require AT&T to take affirmative steps sufficient to ensure that the competitiveness of any enhanced service does not vary based on the control of regulated, basic services, either by providing actual collocation or by providing transmission at equal rates.[124] As a practical matter, says IDCMA, most enhanced service provider equipment that would be installed in central offices is small, can be remotely tested, and presents few technical problems that would necessitate frequent access by non-carrier personnel.[125] IDCMA argues that, if collocated space is unavailable, it would be feasible to run a tie cable from AT&T's central office to the enhanced service provider's equipment in a different building nearby.[126]

51. The US West reply comments construe AHTUC's opposition as asserting that AT&T should be required to construct and maintain facilities that bypass use of local exchange access whenever AT&T offers a collocated enhanced service. US West argues that acceptance of this recommendation by the Commission would be inherently arbitrary, capricious, and directly contrary to its longstanding policy against bypass of local exchange facilities.[127]

52. The AT&T reply rejects suggestions that AT&T provide actual or virtual collocation and notes that the Commission has specifically declined to adopt such requirements.[128] Regarding dial-up access, AT&T states that, because APS is an X.25-based offering, asynchronous, dial-up access to APS would entail asynchronous protocol conversion, an enhanced service that it says cannot be provided under tariff as part of APS.[129] AT&T adds that asynchronous, dial-up access to APS is already available through the Redi- Access offering of Control Data Corporation. AT&T states that it has conducted initial market and technical feasibility studies of offering synchronous, dial-up access to APS, but that it has not finalized plans to implement such an offering.[130] Different problems would affect the provision of dial-up access to DDS, it says: there would be a problem in matching the asynchronous dial-up signals from point-of-sale terminals operating at 300 and 1200 bits per second with a synchronous DDS capability that operates at a minimum of 2400 bits per second.[131] In addition, claims AT&T, the design of a dial-up access offering would require the use of matching modems, and would potentially introduce a requirement to publish new network interfaces.[132] AT&T argues that there is no evidence of a bonafide market demand for such a service and there is a lack of cost justification for the additional equipment required.[133]

53. AT&T also responds to criticisms of its offering of high capacity multiplexing as a means of minimizing transmission costs by stating that it plans to offer a new subrate multiplexing service, which some parties indicated would be of some utility to competing enhanced service providers.[134] Subsequently, AT&T did file a subrate data multiplexing (SDM) tariff, which became effective on March 20, 1988.[135] According to AT&T, SDM will enable customers to multiplex 2.4, 4.8, and 9.6 kbps subrate digital circuits at a DDS office, from up to 20 customer locations, onto a single 56 kbps channel equipped with secondary channel option for transport to a distant DDS office. Alternatively or in addition, the multiplexed signal can be demultiplexed and "fanned out" at the distant DDS office to as many as 20 different customer locations.[136]

(2) *Discussion*

(a) *General*

54. Although the minimization of transmission cost requirement does not require AT&T to minimize the costs of transmission between exchange carrier end offices and enhanced service provider facilities,[137] AT&T is required to minimize enhanced service provider transmission costs when it is reasonably possible to do so. We find that AT&T has satisfied this requirement through its provision of multiplexing services that should enable enhanced service providers to reduce some of their transmission costs.

55. Parties have proposed a wide range of alternative methods for minimizing such costs, including: mandatory physical collocation; various "virtual collocation" schemes, in which Transaction Services would pay some surrogate charge for transmission services it avoids using through collocation, or AT&T would pay a share of costs of transmission services, usually provided by LECs, that competitors of Transaction Services must use to access the AT&T network; and dial-up access to both APS and DDS. We conclude that none of these suggestions are appropriate means of satisfying the requirement that transmission costs be minimized for competitors of Transaction Services.

(b) *Collocation and Virtual Collocation*

56. The Commission has already rejected mandatory physical collocation as a way of minimizing transmission costs.[138] Therefore, parties' requests for mandatory collocation as a CEI requirement are inappropriate.

57. Parties also request the imposition of several types of "virtual collocation" or rate averaging schemes to equalize the positions of non-collocated enhanced service providers and Transaction Services. In considering these proposals, we note that the Commission, in conditionally approving two BOC CEI plans,[139] permitted (but did not require) those BOCs to satisfy the minimization of transmission costs requirement through the use of averaged transmission rates. Each of those BOCs charged its enhanced service operations rates for transmission between its collocated enhanced and basic service equipment that

are identical to the rates that all other enhanced service providers pay for transmission between their noncollocated equipment and the BOCs' basic central office facilities. In evaluating AT&T's Plan and the parties' proposals for "virtual collocation" or averaged transmission rates against this backdrop, we note that, unlike the situations in the BOC CEI plans discussed above, AT&T has no control over the transmission facilities, generally owned by the LEC, that other enhanced service providers use to access the AT&T basic network. Yet it is precisely the costs of such LEC transmission that parties propose that AT&T minimize. While we conclude that, to fulfill its CEI obligations AT&T must take reasonable steps to allow competing enhanced service providers to minimize transmission costs, we do not find it reasonable to require AT&T to pay for its competitors' local access costs, which they purchase from unaffiliated carriers, or to charge itself for LEC access facilities it does not use. Accordingly, we will not impose on AT&T any of the various virtual collocation proposals advanced by the parties commenting on the Plan.

(c) *Dial - Up Access*

58. Because none of the *Computer III* orders specifically address the provision of dial-up access as a means of satisfying the cost-minimization requirement, we must evaluate commenters' dial-up access proposals[140] on the basis of the Commission's general position that the CEI requirements should be interpreted "in a reasonable and efficiency-promoting manner" that does not demand "impossible or grossly inefficient over-engineering of the network so that absolute equality is always achieved."[141] As an example of the steps that AT&T and the BOCs could take within the constraints of reasonable cost and efficiency, the Commission cited the provision of loop or trunk multiplexing as one service that the carriers could offer to help minimize the transmission costs incurred by enhanced service providers.[142] The *Phase II Reconsideration Order* emphasized that the Commission had mentioned multiplexing as an exemplary, but not mandatory, means of addressing the Commission's concerns, and indicated that collocation, voluntarily offered to other enhanced service providers by the carrier, would be one acceptable alternative means of satisfying the cost-minimization requirement.[143] We interpret these decisions to mean that AT&T (and the BOCs) must offer interconnections that are at least as efficient as multiplexing in minimizing transmission costs, but we do not believe that those carriers are required to offer interconnections that may be substantially less cost-effective than multiplexing.

59. On that basis, we reject proposals that AT&T be required to provide dial-up access to APS. As noted above, APS does not presently offer packet assembly-disassembly, which must be provided by the customer. The commenting parties do not explain how the typical customer requiring dial-up access would be capable of providing its own packet assembly-disassembly. Since APS uses the synchronous X.25 protocol, dial-up access to APS without protocol conversion would require that it be accessed through the public switched network by transaction processing terminals that communicate in the X.25 protocol. Assuming that such service is technically feasible,[144] the record in this proceeding provides no evidence that there are, or will soon be, a sufficient number of X.25 terminals in the marketplace to support such an offering.[145] While it might well make good business sense for AT&T to augment APS with PAD functions and dial-up access, particularly if those features were offered in conjunction with protocol processing, we will not require AT&T to provide PAD service with APS.

60. Providing dial-up access to DDS from point-of-sale terminals would apparently be less complex than providing dial-up service to APS, because DDS does not require that transmissions be packetized into the X.25 format. Even so, the record in this proceeding provides little reason to believe that there would be sufficient demand to absorb the cost of providing the service. Commenters who support dial-up access provide no evidence of market demand, beyond their own requests for the service, and one of those parties even concedes that dial-up access would be useful only in low-volume areas where competing enhanced service providers cannot justify installing their own dial-up nodes.[146] It is also unclear how much the service would cost. This record certainly would not justify imposing such a requirement.

(d) *Multiplexing*

61. As discussed above, multiplexing was specifically mentioned by the Commission as an example of a cost-efficient interconnection service that carriers can provide to help minimize local transmission costs for enhanced service providers. While the 1.5 mbps multiplexing service mentioned in the Plan appears to be of limited value to the firms that compete with Transaction Services, AT&T has since offered subrate multiplexing in response to a suggestion from one of the opposing commenters.[147] This service should assist enhanced service providers to minimize transmission costs in metropolitan areas where they have deployed multiple nodes for dial-up access from point- of-sale terminals. In some metropolitan areas, depending upon the volume of business involved, enhanced service providers can often save money by deploying more than one node and connecting the nodes to an AT&T central office with private lines. If each of a firm's multiple nodes in a given metropolitan area does not by itself generate sufficient traffic to justify 56 kbps access connections to AT&T facilities, subrate multiplexing offers the enhanced service provider a means of aggregating its traffic into a single bit stream, operating at higher data rates, at lower unit costs. The absence of subrate multiplexing by AT&T would not preclude the enhanced service provider from providing its own subrate multiplexing at one of its nodes, but doing so would require that communications from its other local nodes be relayed to the multiplexing node before being transmitted to an AT&T central office. Alternatively, the enhanced service provider could cause each of its nodes to communicate directly with an AT&T office at low data rates. In that case, the enhanced service provider might have to subscribe to multiple DDS channels for inter-LATA transmission. Subrate multiplexing allows the enhanced service provider to "have it both ways," *i. e.*, provide direct communication with AT&T for all nodes without foregoing the opportunity to aggregate data streams for low-cost interexchange transmission. We conclude that AT&T's subrate multiplexing offering constitutes a reasonable, good-faith effort to satisfy the Commission's cost-minimization requirements, and we approve this part of the Plan.

h. Recipients of CEI

62. The *Phase I Order* stated that carriers should not restrict the availability of CEI to any particular class of customer or enhanced service competitor.[148] The *Phase I Reconsideration Order* clarified that customer or use restrictions for state-tariffed basic services were permissible, but it required carriers to provide an explanation of, and justification for, any such state-tariffed restrictions in their CEI plans.[149]

(1) *Positions of the Parties*

63. In the Plan, AT&T states that CEI for Transaction Services is based on existing tariffed services which are generally available to enhanced service providers and to all other users without any restriction as to the identity of the user. For that reason, it argues, this element of the Commission's CEI requirements is clearly met.[150] No other parties comment on this provision.

(2) *Discussion*

64. We approve this part of the Plan because, as AT&T attests, there are no customer or use restrictions in the tariffed services that it will provide to Transaction Services and offer to its enhanced service competitors.

3. CEI Pricing

65. The Commission established a set of pricing requirements for CEI that permit, but do not require, charges for distance-sensitive transmission to be cost-based.[151] The *Phase I Order* stated that mandatory price averaging could be inappropriate for the distance-sensitive costs of the dedicated transmission facilities because such costs are specific to particular competitors and averaging could cause economic distortions.[152] However, the Commission also found that all enhanced services, including the carrier's enhanced services, should pay an equal charge covering the costs of operating interconnection facilities[153] and providing the unbundled basic services utilized by all enhanced service providers, even if actual costs for interconnection with collocated and noncollocated facilities might differ.[154] That Order also provided that equal prices should apply to the costs of traffic concentration equipment located at the carrier's facilities.[155] In the *Phase I Reconsideration Order*, the Commission expressly declined to alter this CEI pricing framework.[156]

(a) *Positions of the Parties*

66. AT&T does not address the CEI pricing requirements in any specific section of the Plan, but various portions of the Plan provide some information concerning the extent to which AT&T will comply with those pricing requirements. For example, AT&T states that Transaction Services will be charged the full, tariffed rate for "such . . . private line service components that are required to provide the interconnection [to APS]."[157] It adds that, because existing tariff regulations do not specifically provide for interconnection of collocated enhanced service equipment, AT&T will file tariff revisions to permit such connections in the AT&T central office.[158]

67. As described in Section IV.A.2.g above, the Plan also states that AT&T provides a tariffed multiplexing function that permits enhanced service providers and other users to access AT&T's central offices at a rate of 1.5 mbps,[159] and that AT&T has also initiated a tariffed subrate multiplexing service.[160] The Plan does not specifically state whether or not Transaction Services will pay for those concentration capabilities at the same tariffed rates that will be applied to entities that are not affiliated with AT&T.[161]

68. No other parties comment specifically on the extent of AT&T's compliance with the CEI pricing requirements.

(b) *Discussion.*

69. There are two CEI "average" pricing requirements that apply to the costs of basic service provided to enhanced service providers at the carrier's central office or point of presence – the basic interconnection charge (which covers the cost of interconnection facilities) and the basic concentration charge (which covers the costs of traffic concentration equipment). Based on statements in several parts of the Plan, it appears that Transaction Services will take various basic services at tariffed rates. However, because the Plan does not contain a section on CEI pricing, we have neither a confirmation that AT&T will satisfy the specific CEI pricing requirements, nor a clear description of its plans for doing so. We therefore require AT&T to submit, by May 31, a statement that explains how it will comply with the CEI pricing requirements.

4. Other Nonstructural Safeguards

a. Allocation of Joint and Common Costs

70. The *Joint Cost Order* adopted rules for the allocation of costs between regulated and unregulated services. The *Phase II Order* required as part of the CEI requirements that AT&T and the BOCs comply with those rules.[162]

(1) *Positions of the Parties*

71. In the Plan, AT&T states that it will account for the joint and common costs of collocated Transaction Services pursuant to the provisions of AT&T's Part 32 cost allocation manual, once that manual is approved by the Commission. That manual is required by the *Joint Cost Order*.[163] AT&T states that it does not anticipate offering Transaction Services on a collocated basis until it has received authority to implement that manual.[164] No other parties comment on this aspect of the Plan.

72. As noted above, the TSPs, in their discussion of cost-minimization requirements, cite the General Accounting Office's conclusion that the Commission's joint cost allocation rules cannot "ultimately provide telephone ratepayers or carrier competitors positive assurance that [the] FCC's joint cost rules will guard against cross-subsidy," which they say was drawn "even before AT&T submitted its cost accounting manual."[165]

(2) *Discussion*

73. On March 29, 1988, we approved AT&T's cost allocation manual subject to a number of conditions and requirements for the submission of further information.[166] The adequacy of the Commission's joint cost allocation rules are not at issue in this proceeding. Subject to the conditions that we adopted in our order approving AT&T's cost allocation manual, *supra*, we find that this section of the Plan complies with the *Computer III* requirements.

b. Customer Proprietary Network Information

74. The *Phase II Order* adopted CPNI requirements for the enhanced services operations of AT&T and the BOCs that require those carriers to (1) make CPNI available, upon customer request, to unaffiliated enhanced service vendors on the same terms and conditions that are available to their own enhanced services personnel; (2) limit their enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. It also required the BOCs, but not AT&T, to provide to unaffiliated enhanced service vendors any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel.[167]

75. The Commission adopted several requirements in the *Phase II Reconsideration* to increase customers' ability to limit access to their CPNI.[168] First, the CPNI notice from AT&T or a BOC to its multiline business customers must include a response form that customers may use to inform the carrier of their preferred CPNI treatment. Second, AT&T and the BOCs must honor a customer's choice to restrict release of its CPNI until the customer specifically notifies the carrier to the contrary. Third, customers may restrict AT&T or BOC access to some or all of their CPNI for specific time periods or for specific purposes. Fourth, AT&T and the BOCs must honor customer requests for restricted treatment of CPNI that are sent before the carriers send notices of CPNI rights. Fifth, AT&T and the BOCs must submit amendments to their ONA plans to include copies of their proposed notification of CPNI rights and response forms.

(1) *Positions of the Parties*

76. AT&T attaches, and incorporates by reference, the CPNI procedures that it proposed in response to the *AT & T Structural Relief Order*, stating that its CPNI procedures for Transaction Services will be the same.[169] AT&T asserts that, because few customers will request general confidential treatment of their CPNI, it will not be practical or efficient to establish a separate sales group for such customers.[170] The Plan indicates that, in most cases, when a customer requests that all of its CPNI be kept confidential, AT&T's marketing personnel will refrain from all sales efforts for customer premises equipment (CPE) and enhanced services to that customer, except that customer-initiated orders will continue to be processed.[171]

77. The TSPs argue that AT&T's CPNI proposals are inadequate in two ways. First, they claim, AT&T Transaction Services would be left free to use the CPNI of competitors' customers, unless such customers request that access to their CPNI be restricted.[172] Second, AT&T would "penalize" customers who make such requests by no longer marketing its enhanced services to them.[173] As for AT&T's claim that it would be uneconomical for it to establish a separate sales group for such customers, the TSPs argue that this assertion is undercut by a simultaneous offer that AT&T has made to offer a separate cadre of marketing personnel – the "Vendor Liaison Program" – for those customers requesting limited access in connection with a specific project.[174] If AT&T can accommodate that specific kind of confidentiality request, the TSPs contend, it should be able to accommodate the more general type of confidentiality requests.[175] CCTU similarly argues that AT&T should be required to comply with the CPNI requirements of the *Computer III* orders and that AT&T should not be permitted to refuse to provide enhanced services to customers who request confidential treatment of their CPNI.[176]

78. The AT&T reply states that nothing in the Commission's CPNI safeguards mandates the establishment of a separate sales force whenever AT&T customers request general confidentiality of their CPNI, and it reiterates its assertion that it would be impractical and inefficient for AT&T always to establish separate CPE and enhanced services sales forces for all customers requesting confidentiality.[177] The TSPs' concern that AT&T will have an unfair advantage in its access to the CPNI of its competitors' customers is not well founded, AT&T asserts, noting that the *Phase I Order* said that enhanced service providers can address that concern by asking their customers to request confidential treatment.[178]

(2) *Discussion*

79. The *Phase II Reconsideration Order* adopted CPNI requirements that AT&T could not have anticipated at the time that it submitted the Plan. While the Plan does not reflect those requirements, AT&T has responded to them in an amendment to its Open Network Architecture Plan.[179] The Commission has invited interested parties to comment on AT&T's ONA Plan, including the amendment, and will review it in a separate proceeding. We shall therefore approve this section of the Plan on an interim basis, until either (a) the date on which the Commission approves AT&T's ONA Plan, including the March 10 Amendment; or (b) in the event the Commission does not approve AT&T's ONA Plan, any deadline that the Commission sets for AT&T's compliance with the CPNI requirements. This interim approval of the Plan's CPNI provisions will automatically become permanent when, and if, the Commission finds that AT&T has complied with the CPNI rules for ONA purposes.

80. We decline to require that AT&T continue marketing enhanced services to customers that request confidential treatment of their CPNI. As indicated above, AT&T states that it will continue to process customer-initiated requests for service from such parties. We interpret AT&T's statement to mean that its personnel will both provide enhanced and basic service requested by such customers and provide complete and responsive answers to their questions about the enhanced services being offered.[180] We do not think that AT&T's proposal not to target customers who request confidential treatment of their CPNI for enhanced service marketing efforts amounts to a "penalty" for their exercise of their CPNI rights or will be perceived as such by these customers. Accordingly, subject to AT&T's filing satisfactory amendments, as discussed above, we approve this part of its Plan.

c. Nondiscrimination Reporting

81. The *Phase II Order* required that, as part of their CEI obligations, AT&T and the BOCs file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff.[181] The *Phase II Reconsideration Order* eliminated the requirement that AT&T submit reports on the quality of the basic services included in its CEI offerings, provided that it (1) amends its ONA plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based

discrimination, and (2) submits an annual affidavit attesting that it has followed the installation procedures described in its ONA plan amendments and that it has not, in fact, discriminated in the quality of network services used by competing enhanced service providers.[182]

82. The *Phase II Reconsideration Order* also denied AT&T's request for permission to file installation and maintenance data only for its own enhanced service operations, but the Commission modified its requirements to permit AT&T to file reports comparing installation and maintenance intervals provided to its own enhanced service operations with those provided to a sampling of all customers.[183]

(1) *Positionsof the Parties*

83. Noting that it had petitioned for reconsideration of the *Phase II Order*'s nondiscrimination reporting requirements, AT&T proposed a procedure which it describes as an interim measure to be applied pending resolution of that petition. AT&T proposes to provide quarterly reports that would show only the time periods required for the installation and maintenance of the basic services underlying its own Transaction Services offering. These reports, it says, would be identical in substance to those now required for noncollocated Transaction Services.[184]

84. AHTUC argues that AT&T has not demonstrated good cause why the reporting requirements should be stayed and urges the Commission not to excuse AT&T from that requirement. Until the Commission acts on AT&T's petition, it says, the requirement should remain in place.[185]

85. The TSPs argue that discrimination is a far greater concern in the provision of collocated services than it is for CPE, because the opportunities to hinder one's competitors or help one's own affiliate in non- obvious ways increase as services become more integrated.[186] AT&T, they say, should be required to submit full nondiscrimination reports to ensure that nonaffiliated transaction service providers receive basic services equal in quality to those given AT&T's Transaction Services.[187]

(2) *Discussion*

86. As in the case of CPNI, the Commission revised its nondiscrimination reporting requirements after AT&T filed the Plan, and AT&T has responded to the revised requirements in the March 10 Amendment to its Open Network Architecture Plan. We shall therefore approve this section of the Plan under the same conditions that we approve the CPNI section of the Plan, *i. e.*, on an interim basis, until either (a) the date on which the Commission approves AT&T's ONA Plan, including the March 10 Amendment; or (b) in the event the Commission does not approve AT&T's ONA Plan, any deadline that the Commission sets for AT&T's compliance with the nondiscrimination reporting requirements. This interim approval of the Plan's nondiscrimination reporting provisions will automatically become permanent when, and if, the Commission finds that AT&T has complied with the nondiscriminatory reporting rules for ONA purposes.

d. Network Information Disclosure

87. The *Phase II Order* required AT&T and the BOCs to disclose information about network changes or new network services that affect the interconnection of enhanced services with the network at two points in time.[188] First, a carrier must disclose such information at the "make/buy" point – that is, when the carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface. The Commission permitted AT&T and the BOCs to condition "make/buy" disclosure of technical network information on the signing of a nondisclosure agreement and to provide the required network information within 30 days of the execution of such an agreement. Second, the Commission required AT&T and the BOCs to release publicly all technical information at least twelve months prior to the introduction of the new service or network change that affects enhanced service interconnection with the network. However, if a carrier is able to introduce the service between six and twelve months after the make/buy point, public disclosure is permitted at the make/buy point, but no less than six months before the introduction of the service. The Commission declined to modify those requirements in the *Phase II Reconsideration Order*.[189]

(1) *Positions of the Parties*

88. AT&T asserts that the collocation of Transaction Services will not require any changes to the standard interfaces that are now used and that, consequently, there is no new or changed network information that needs to be disclosed in connection with the Plan.[190] No other party comments on this aspect of the Plan.

(2) *Discussion*

89. We agree with AT&T that, since its offering of Transaction Services will not involve any new network interface or services, it is not required at this time to disclose information about network changes or new network services. As discussed above, the Commission's rules require that AT&T disclose such information in the future should it make any changes in its network interfaces or services used in connection with Transaction Services.

B. Billing and Network Management

1. *Positions of the Parties*

90. AHTUC maintains that AT&T has failed to comply with the unbundling requirement because it has failed to describe the AT&T billing and network management services which, it contends, Transaction Services is almost certain to use. AHTUC quotes the *Phase I Order* as requiring that "all basic network capabilities utilized by the carrier's enhanced service offerings, including signaling, switching, billing and network management," are subject to the unbundling requirement.[191]

91. In reply, AT&T contends that the set of basic functions that comprise APS includes billing and network management services in addition to transport and packet switching, and that Transaction Services obtains these capabilities as a set under the same tariffed terms and conditions available to competing enhanced service providers.[192] As discussed above, AT&T construes the *Phase I Order* as requiring only that the underlying basic service functions used by Transaction Services be unbundled as a set.[193]

2. *Discussion*

92. AT&T states that the unbundled basic services used by Transaction Services and its competitors include billing and network management for those basic services. Since AT&T's Transaction Services operations will pay the same tariffed rates for the same basic service functionality, including billing and network management for those basic services, AT&T has satisfied our unbundling requirements in this respect.

93. However, AT&T has not described whether or how it would bill customers for Transaction Services (as opposed to the underlying basic services). For example, it is not clear whether or not AT&T will integrate its billing operations for Transaction Services with those for its basic services. [194] Accordingly, we require AT&T to file with us, by May 31, 1988, a description of how it will bill customers for its enhanced Transaction Service. [195]

V. ORDERING CLAUSES

94. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's CEI Plan for Transaction Services IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock.
Chief, Common Carrier Bureau

APPENDIX A

PARTY FILING CEI PLAN

American Telephone and Telegraph Company (AT&T)

PARTIES FILING COMMENTS

International Business Machines Corporation (IBM)

Southwestern Bell Telephone Company (Southwestern)

Telenet Communications Corporation (Telenet)

California Bankers Clearing House Association, Mastercard International, Inc., the New York Clearing House Association, Visa USA, Inc., and the Association of Data Communications Users (the Transaction Service Providers or TSPs)

PARTIES FILING OPPOSITIONS

Ad Hoc Telecommunications Users Committee (AHTUC)

Committee of Corporate Telecommunications Users (CCTU)

PARTIES FILING REPLY COMMENTS

AT&T

Independent Data Communications Manufacturers (IDCMA)

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)

Southwestern

The TSPs

PARTY FILING MOTION TO STRIKE

AT&T

PARTY FILING OPPOSITION TO MOTION TO STRIKE

CCTU

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987)(*Phase I Recon Order*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988)(*Phase I Further Recon Order*). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988)(*Phase II Recon Order*).

[2] A list of commenters appears in Appendix A. We use the abbreviations in that appendix throughout this order.

AT&T has filed a motion to strike CCTU's opposition on the ground that it was filed late in the pleading cycle, on the date when replies were due rather than the date when comments and oppositions were due. CCTU contested AT&T's motion to strike, and subsequently introduced its opposition into the record pursuant to our *ex parte* rules. Letter from Michael W. Faber to H. Walker Feaster III, filed February 9, 1988. Because we accept CCTU's filing of the opposition at issue under our *ex parte* rules, we dismiss AT&T's petition to strike as moot.

[3] *See* 47 C.F.R. §§ 0.91 and 0.291 (1987).

[4] *Phase I Order*, 104 FCC 2d at 1020, para. 115; *Phase I Recon Order*, 2 FCC Rcd at 3042, paras. 49-50. AT&T and the Bell Operating Companies (BOCs) also must satisfy the cost allocation requirements of the *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See Joint Cost Order*, 2 FCC Rcd 1298 (1987), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Joint Cost Recon Order*).

[5] *Phase I Order*, 104 FCC 2d at 1036, para. 147; *id.* at 1036, para. 147.

[6] *Id.* at 1039-1043, paras. 154-165.

[7] Petition of the American Telephone and Telegraph Company for Limited and Temporary Waiver of 47 C.F.R. Section 64.702 Regarding its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released Nov. 27, 1985), *application for review denied*, *Phase I Order*, 104 FCC 2d at 1043, n. 220.

[8] Plan at 4-5.

[9] *Id.* at iii and 2-6.

[10] *Id.* at 5.

[11] *Id.* at 4, n. *.

[12] Letter from E.C. Fletcher of AT&T to H. Walker Feaster, III (filed Feb. 19, 1988) (summarizing verbal *ex parte* presentation by Fletcher to Commission staff) (AT&T February 19 Letter) at 1.

[13] *Id.*

[14] Plan at *iv*.

[15] *Id*. The devices commonly referred to as "PADs" are usually equipped to perform protocol processing as well as packet assembly and disassembly, but "PAD functions" and similar expressions are used herein to denote only packet assembly and disassembly.

[16] AT&T Feb. 19 Letter at 1.

[17] Plan at 5. Only PAD-equipped Transaction Service nodes will communicate directly with APS (AT&T Feb. 19 Letter at 1) because APS, as presently offered, provides neither protocol processing nor PAD functions. Plan at Attachment A, AT&T Tariff FCC No. 4, 7th Revised Page 48.1, Section 6.1.

[18] Plan at 3.

[19] For example, the customer might provide Transaction Services with a list of the numbers of lost or stolen credit cards; Transaction Services could then automatically reject attempts to process such cards. AT&T Feb. 19 Letter at 1.

[20] Neither the Plan's text nor the accompanying diagrams indicate that any protocol conversions will be performed between customers' host computers and APS. Since APS can only accept communications in the X.25 format, the implication is that host computers must generate and receive messages in the X.25 protocol.

[21] *Phase I Recon Order*, 2 FCC Rcd at 3048, para. 92.

[22] *Id*.

[23] Plan at 8.

[24] *Id*. at 5-6 and 8, n.

[25]

[25] *Id*. at 5.

[26] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-165.

[27] *Id*. at 1039, para. 157.

[28] Plan at 6-7.

[29] *Id*. at 7.

[30] *Id*.

[31] *Phase I Order*, 104 FCC 2d at 1040, para. 158.

[32] *Id*. at n. 215.

[33] *Phase II Order*, 2 FCC Rcd at 3080-3081, paras. 59-63.

[34] Petitions for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 1057 (1985).

[35] *Phase II Order* at 3080, para. 62. The Commission modified these requirements in the *Phase II Recon Order* at paras. 28-52.

[36] *Phase II Order* at 3080, para. 62.

[37] *Id*. at 3081, para. 63.

[38] *Id*.

[39] *Transmittal 474 Order*, 2 FCC Rcd 588 (1987), *reconsideration denied*, 2 FCC Rcd 5231 (1987). *See also* AT&T Communications, Inc., Revisions to Tariff F.C.C. Nos. 260, 266, 268, 270, 273 and 274 (Accunet Packet Service), 101 FCC 2d 144 (1985) (*Investigation Order*).

[40] 2 FCC Rcd at 589, para. 13.

[41] *Id*. at 590, para. 18.

[42] Plan at 8.

[43] *Id*.

[44] *Id*. at 9. "Connections" in this context describes interconnections inside an AT&T central office. That term does not describe local access lines outside the office. We note that AT&T has filed a tariff for central office connections with collocated equipment. AT&T Tariff Transmittal No. 1129, filed Feb. 9, 1988.

[45] Plan at 9.

[46] IBM Comments at 3-4.

[47] *Id*. at 5.

[48] *Id*. at 9, *citing Phase I Order* at 104 FCC 2d 1106, para. 301.

[49] *Id*., *citing Phase I Recon Order*, 2 FCC Rcd at 3039-3040, and *Phase II Order*, 2 FCC Rcd at 3080-3081, paras. 62-63.

[50] *Id*. at 11, n. 19, *citing* AT&T Opposition to Petition for Reconsideration, CC Docket No. 84-906 at 4-6 (filed Mar. 12, 1987). In this context, embedded costs (i) exclude marketing costs, (ii) include the cost of capital, and (iii) include the cost of facilities actually used, as contrasted with the averaged facilities costs that are typically reflected in tariffs.

[51] *Id*.

[52] Telenet Comments at 10-11, *citing Phase II Order*, 2 FCC Rcd 3072 at 3080-3081 (1987).

[53] *Id*. at 11-12, *citing* AT&T Transmittal No. 474 (filed Oct. 4, 1985).

[54] CCTU Opposition at 13-15.

[55] *Id*. at 13.

[56] CCTU Comments at 13-14.

[57] TSP Reply at 5-7. We address separately AHTUC's related comments in section IV.B, *infra*. AHTUC contends generally that AT&T should be required to unbundle, and offer under tariff, any billing and network management services performed by AT&T for Transaction Services. AHTUC Opposition at 23.

[58] AT&T Reply at 15-17, *citing Phase II Order* at paras. 62-63.

[59] *Id*. at 18, *citing Transmittal 474 Order*, 2 FCC Rcd 588 at 590, para. 18 (1987), *aff' d on reconsideration*, 2 FCC Rcd 5231 (1987).

[60] *Id*. at 18.

[61] *Id*. at 17, n. **, (emphasis added by AT&T) *citing Phase I Order*, 104 FCC 2d at 1040, para. 158, n. 215, where the Commission states, "For example, if a carrier's enhanced service utilizes digital transmission, supervisory signaling, calling number identification, and a special alert signal, such as a stutter dial tone, CEI for that service should include these basic services as a set unbundled from all other basic offerings."

[62] 104 FCC 2d at 1106, para. 301.

[63] *Phase II Order* at 3080, para. 62.

[64] *Phase II Order*, 2 FCC Rcd at 3080-3081, paras. 62-63.

[65] The *Phase II Order* superseded the language in the *Phase I Order*, cited by IBM, that temporarily applied the terms of the *Asynchronous / X. 25 Order* to AT&T. *See supra*, note 62.

[66] *Phase I Order*, 104 FCC 2d at 1041, para. 160.

[67] *Phase I Recon Order*, 2 FCC Rcd at 3048, para. 92.

[68] *Id*. at 3048, paras. 92 and 87.

[69] Plan at 10.

[70] *Id*. at 10-11.

[71] IDCMA Reply at 4.

[72] *Id*. at 7.

[73] *Id*. at 7-8.

[74] AT&T Reply at 5-7.

[75] *See Phase I Recon*, 2 FCC Rcd at 3048, para. 92.

[76] Plan at 15, *citing* AT&T Tariff FCC No. 9, § 3.3.2.

[77] *Phase I Order*, 104 FCC 2d at 1041, para. 161.

[78] Plan at 11.

[79] *Id*. at 11-12.

[80] *Phase I Order*, 104 FCC 2d at 1041, para. 162.

[81] Plan at 13.

[82] *Id*.

[83] *Phase* I Ord er, 104 FCC 2d at 1041, para. 163.

[84] Plan at 13-14.

[85] Id. at 14.

[86] Plan at 8; AT&T Tariff No. 9, § 6.2.4.

[87] Phase I Order, 104 FCC 2d at 1042, para. 164.

[88] Phase I Recon Order, 2 FCC Rcd at 3068, n. 261.

[89] Id.

[90] Phase II Recon Order, 3 FCC Rcd at 1155, paras. 32-34.

[91] Id. at para. 50. See also id. at para. 52.

[92] Plan at 14.

[93] Id. at 15.

[94] AHTUC Opposition at 3.

[95] Id. at 14-15.

[96] Id. at 15.

[97] Id. at 15-16.

[98] Id. at 17-19.

[99] Id. at 19.

[100] Id. at 19, n. 30.

[101] Id. at 21-22. By zero mileage, AHTUC apparently means the minimum monthly charge for local transmission that is available to noncollocated entities under tariff.

[102] Id. at 21-22.

[103] TSP Comments at 5.

[104] Plan at 9.

[105] Id. at 9-10. To illustrate AT&T's putative advantage, the TSPs state that a study commissioned by the Department of Justice estimates that 18-22 percent of the total cost of electronic transaction processing consists of front end transport, which is consistent with the TSPs' own data. Id. at 10, n. 12, citing Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry (January 1987) (the Huber Report) at 12.13. The Huber Report was prepared for the U.S. Department of Justice, Antitrust Division, as part of a review of the Modified Final Judgment (MFJ) in U.S. v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The Department of Justice reports to the court every three years concerning the continuing need for the restrictions imposed by the decree. Id. at 552 F. Supp. 195.

[106] TSP Comments at 10-11, citing General Accounting Office, Telephone Communication: Controlling Cross-Subsidy Between Regulated and Competitive Services at 54 (October 1987).

[107] Id. at 15.

[108] Id. at 19.

[109] TSP Reply at 4. TSP states, "AT&T will be providing local transmission services as part of a large Digital Telecommunications Switching system contract it has entered into with the United States Department of the Treasury. See, e.g., Scott, AT&T/Fed Deal Draws Telco Wrath, Network World, Dec. 7, 1987 at 1. Moreover, AT&T's current tariffs already provide for access to AT&T's Megacom or SDN [Software Defined Network] services through dedicated facilities obtained from AT&T. See AT&T Tariff PSC 12 §§ 1.8.7, 3.31, 4.41. Finally, a recent survey commissioned by New York Telephone of 215 of the largest 500 telephone customers in Manhattan confirms that AT&T is already providing direct connections to customers in New York. Proceeding on the Motion of the Comm'n to Review Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition, Case 29469, Exhibit No. 127 (N.Y.D.P.S. entered into record Oct. 1, 1987)." Id. at 5.

[110] TSP Comments at 23, n. 28; Letter from Henry D. Levine to H. Walker Feaster III, filed Feb. 26, 1988 (TSP Letter) at 2.

[111] TSP Comments at 23, n. 28. As discussed infr a, para. 52, AT&T states in its reply that it will offer such multiplexing, and it has since offered the service under tariff.

[112] TSP Letter at 2.

[113] TSP Reply at 3.

[114] Id.

[115] Telenet Comments at 9.

[116] Id. at 9, n. 8.

[117] Id.

[118] CCTU Opposition at 8.

[119] Id. at 9-10.

[120] Id. at 10.

[121] Id. at 18.

[122] Id. at 18, n. 27.

[123] Id. at 16.

[124] IDCMA Reply at 4-5.

[125] Id. at 6.

[126] Id. at 7. IDCMA says that we should permit "virtual collocation," by which it means "the imposition of surrogate transport charges on the carrier's enhanced service," only as a stop-gap measure, because it does not provide precise technical as well as economic parity. Id. at 8. See supra, para. 7.

[127] US West Reply at 1-2.

[128] AT&T Reply at 6-7 and 9-14, citing Phase I Order, 104 FCC 2d at 1047-1049, paras. 172-176, and Phase I Recon Order, 2 FCC Rcd at 3053, para. 126.

[129] AT&T Reply at 6, n. *.

[130] Id.

[131] Letter from E.C. Fletcher of AT&T to H. Walker Feaster III, March 24, 1988 (summarizing ex parte presentation and providing further responses to questions raised by Commission staff) (AT&T March 24 Letter) at 2.

[132] Id.

[133] Id.

[134] Id. at 8. See TSP Comments at 23, n. 28. As noted above, the TSPs qualified their support of subrate multiplexing in an ex parte presentation.

[135] AT&T Tariff No. 9, § 6.2.4.

[136] Id.

[137] See Phase II Recon Order, 3 FCC Rcd at 1157, para. 50.

[138] Phase I Order, 104 FCC 2d at 1042, paras. 151-153.

[139] Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services, 3 FCC Rcd 1095 (1988); Bell Atlantic Plan for the Offering of Voice Message Storage Service, 3 FCC Rcd 1108 (1988).

[140] AHTUC Opposition at 17-19; CCTU Opposition at 10; TSP Reply at 3.

[141] Phase I Recon Order, 2 FCC Rcd at 3048, para. 92.

[142] Phase I Order, 104 FCC 2d at 1042, para. 164.

[143] Phase II Recon Order, 3 FCC Rcd at 1155, paras. 33-34.

[144] In Basic Packet Switching Service, 94 FCC 2d 48 (1983), the Commission stated that it saw no technological reasons why AT&T should not be able to provide dialed access to APS for users with X.25 terminals. Id. at 60, para. 25.

[145] As noted above, AHTUC states that, to the extent that dialed access would require protocol processing, AT&T could request waivers to provide this capability as part of APS.

[146] TSP Reply at 3. See also TSP Letter at 2.

[147] AT&T Tariff Transmittal No. 1126, filed Feb. 4, 1988; TSP Comments at 23, n. 28.

[148] Phase I Order, 104 FCC 2d at 1042, para. 165.

[149] Phase I Recon Order, 2 FCC Rcd at 3051, para. 111.

[150] Plan at 16.

[151] Phase I Order at 1048-9, paras. 174-175.

[152] Id. at 1047, para. 172.

[153] The term "interconnection" in this context describes interconnections on the carriers' premises. It does not include outside access lines.

[154] The Commission recognized that, when the actual costs of interconnection with collocated and noncollocated equipment differ, equal pricing would require cost averaging. It also noted that, if the carrier provides CEI through identical interfaces for itself and others, there is no real issue of "averaging" versus "cost-based" prices: equal interconnection charges would be appropriate under either standard. Phase I Order, 104 FCC 2d at 1050, para. 179.

[155] Id. at 1047, para. 172; id. at 1049, para. 178; id. at 1051, para. 181.

[156] Phase I Recon Order, 2 FCC Rcd at 3052-3053, paras. 121-130.

[157] Plan at 5.

[158] Id. at 5, n. **. AT&T has since filed a tariff transmittal for central office connections with collocated equipment. AT&T Tariff Transmittal No. 1129, filed Feb. 9, 1988.

[159] Plan at 15.

[160] *See* supra, para. 52.

[161] We note, however, that AT&T states generally that "the tariff charges incurred by AT&T's Transaction Services will be identical to the charges that would be incurred by a competing ESP [enhanced service provider] that chooses to provide a comparable enhanced service using AT&T's basic services." Plan at 9.

[162] See Phase II Order, 2 FCC Rcd at 3082, para. 72.

[163] Plan at 16-17, citing Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (Joint Cost Order); modified on reconsideration, 2 FCC Rcd 6283 (1987).

[164] Id. at 17.

[165] TSP Comments at 10-11, citing General Accounting Office, Telephone Communication: Controlling Cross-Subsidy Between Regulated and Competitive Services at 54 (October 1987). However, the TSPs do not appear to be contending that additional allocations requirements are required for this CEI plan.

[166] AT&T's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, Memorandum Opinion and Order, DA 88-377 (released Mar. 29, 1988).

[167] Phase II Order, 2 FCC Rcd at 3094-3098, paras. 152-156, 162-165, 172-174, and 176.

[168] Phase II Recon Order, 3 FCC Rcd at 1163-1164, paras. 104-109.

[169] Plan at 17-19 citing 102 FCC 2d 655 (1985), modified on reconsideration, FCC 86-341, Mimeo 36818 (released Aug. 7, 1986).

[170] Id. at 18.

[171] Id.

[172] TSP Comments at 26.

[173] Id. at 27.

[174] Id. at 26-27.

[175] Id. at 27.

[176] Id. at 19-22.

[177] AT&T Reply at 19.

[178] Id. at 20, citing Phase I Order at 1089, para. 261.

[179] Supplemental Description of AT&T's Procedures to Assure Non-Discriminatory Circuit Provisioning, filed Mar. 10, 1988 (March 10 Amendment).

[180] We condition approval of the Plan upon AT&T's conformance with that understanding. If AT&T's personnel engage in a pattern of behavior that suggests that they are attempting to compel AT&T's basic service customers to release their CPNI to AT&T's enhanced service operations -- by, for example, providing unresponsive or obtuse answers about enhanced service offerings to customers who request confidential treatment of their CPNI -- we will be prepared to take appropriate remedial action, including requiring AT&T to cease providing the affected enhanced services on a collocated basis.

[181] Phase II Order, 2 FCC Rcd at 3082, para. 73.

[182] Phase II Recon Order, 3 FCC Rcd at 1159-1160, paras. 66-71.

[183] Id. at paras. 80-82.

[184] Plan at 20-22.

[185] AHTUC Opposition at 24.

[186] Id. at 27-28.

[187] Id. at 28.

[188] Id. at 3087-88, paras. 107-112.

[189] Phase II Recon Order, 3 FCC Rcd at 1165, para. 120.

[190] Plan at 19.

[191] AHTUC Opposition at 23, citing Phase I Order, 104 FCC 2d at 1040, para. 158.

[192] AT&T Reply at 17, n. **.

[193] Id. at 17, n. *, citing Phase I Order, 104 FCC 2d at 1040, para. 158, n. 215.

[194] AT&T is, of course, required to allocate the costs of billing and network management for Transaction Services pursuant to the applicable Commission requirements.

[195] AT&T may begin offering Transaction Services on a collocated basis upon making this filing and the filing on CEI pricing discussed in Section IV.A.3, supra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ALLTEL MOBILE COMMUNICATIONS OF OHIO, INC. File No. 20226-CD-P/ML-01-88

For Modification of Station KUC973
for a One-way facility at Salem, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1988; Released: May 11, 1988

By the Chief, Mobile Services Division

1. On October 13, 1987, ALLTEL Mobile Communications of Ohio, Inc. (ALLTEL) filed an application with the Commission to modify Station KUC973 to add a 158.10 MHz facility in Salem, Ohio. Landmark Cablevision (Landmark) filed a Petition to Deny ALLTEL's application, and ALLTEL filed an Opposition. Response pleadings were filed. For the reasons set forth below, we will deny Landmark's petition and issue a Notice of Apparent Liability for Forfeiture against ALLTEL.

BACKGROUND AND CONTENTIONS

2. Landmark argues that ALLTEL willfully violated Section 301 of the Communications Act of 1934, as amended, by constructing and transmitting from its proposed site at Salem prior to receiving a construction permit from the Commission, and that ALLTEL therefore does not possess the qualifications to be a Commission Licensee. Landmark argues further, that ALLTEL's license should be suspended and its application for the Salem facility should be denied.

3. Landmark bases its argument on allegations from its chief technician and manager that ALLTEL's transmissions on 158.10 MHz at Salem caused interference to Landmark's cable subscribers who were receiving Home Box Office service over cable channel 20. Landmark submitted the declaration of its chief technician, who stated that after receiving subscriber complaints concerning interference to channel 20, he identified ALLTEL's proposed site at Salem as the source of the interference. Conversations between Landmark's technician and an ALLTEL engineer confirmed that ALLTEL had constructed and was transmitting at that time from the proposed Salem site. Subsequent service calls made by Landmark's technician revealed that in some instances, old "drops", illegal connections, and substandard wiring were allowing ALLTEL's signal into the cable system, but that VCRs and other subscriber equipment were responsible for letting in the inproper signal the majority of the time. Landmark's technician stated that installing converters would alleviate the interference where it was due to subscriber equipment, but that most of its customers were unwilling to install converters or adjust their television sets.

4. ALLTEL argues in its Opposition that Landmark's complaint is not actionable under Commission rules. ALLTEL states that since its facility is operating on 158.10 MHz, and the video carrier of Landmark's HBO is operating at 157.25 MHz, Landmark cannot claim co-channel interference. ALLTEL further argues that the construction of its Salem facility on an existing tower was an innocent mistake, as its technical manager believed that it was to be a fill-in location and that a notification on Form 489 had been filed with the Commission. ALLTEL states that the technical manager did not realize that ALLTEL had chosen to expand its wide-area paging network and had filed a regular application for the Salem site on Form 401.

DISCUSSION

5. Landmark has not persuaded us that ALLTEL's application shoud be denied. Under Section 22.100 of the Commission's rules, an applicant in the public mobile services is only required to guard against interference in specific instances. The case at hand does fall into any of the categories enumerated therein and thus Landmark is not entitled to any protection against ALLTEL's signal. Additionally, we will not deny ALLTEL's application on the basis of its unauthorized transmission from the Salem site, as ALLTEL's application is in good order in all other respects, and we do not think it would be in the public interest to do so. We are choosing instead to deal with the matter of unauthorized construction and transmission separately. We are ion a separate proceeding issuing a Notice of Apparent Liability to ALLTEL for its unauthorized construction and operation.

6. Accordingly, IT IS ORDERED that the application of ALLTEL Mobile Communications of Ohio, Inc., file no. 20226-CD-P/ML-01-88 is hereby GRANTED, conditioned upon ALLTEL's compliance with the Notice of Apparent Liability for Forfeiture issued separately.

7. IT IS FURTHER ORDERED, that the Petition to Deny filed by Landmark Cablevision is hereby DENIED.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for Reconsideration under Section 1.106 or applications for review under Sections 1.115 may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley, Chief
Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NETCALL, INC. File No. 22810-CD-P/L-01-86

For authority to construct facility
in the Public Land Mobile Radio
Service for Station KNKB243 to operate
on frequency 454.200 MHz at Lapeer,
Michigan

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1988; Released: May 11, 1988

By the Chief, Mobile Services Division

1. NetCall, Inc. (NetCall) filed the captioned application for authority to construct a two-way facility at Lapeer, Michigan. RAM Communications of Michigan, Inc. (RAM) filed comments opposing grant of NetCall's application. RAM argues that NetCall's traffic loading study does not meet the requirements set forth in the Commission's rules. RAM states that NetCall failed to include the following information: (1) detailed grade of service calculations, including separate calculations for one-way and two-way units; (2) the assignment of the channel to trunk groups; (3) the time of the survey; and, (4) the number of two-way mobile stations, tone only pagers, tone-plus voice pagers, and tone digital readout pagers in service.

DISCUSSION

2. Applicants are not required to include grade of service calculations as part of their traffic load study. *See* Section 22.516(b) of the rules. Furthermore, since the frequency applied for (454.200 MHz) and the frequency of the existing station (454.250 MHz), are both in the same trunk group, information on the assignment of the channel to trunk groups is unnecessary. However, we agree that NetCall must include the time at which the survey was performed, as required by Section 22.516(b)(2)(iv), and the number of two-way mobile stations and one-way pagers, as required by section 22.516(b)(2)(ii). Furthermore, if the existing system serves both one-way and two-way units, separate occupied time data must be submitted for each group, for the same days and hours. *See* Section 22.16(a)(2)(i).

3. Although NetCall fails to provide certain information, we find that these omissions do not render the application blatantly defective. *See* "Defective Public Radio Service Applications", Mimeo 30894, released April 24, 1980. Furthermore, Netcall's traffic load study indicates an existing grade of service over 0.25, which demonstrates the public's need for the additional channel. *See* Section 22.16 of the rules. We will, therefore, grant Netcall's application on the condition that Netcall submit the required information within thirty days of the release date of this order.

ORDERING PARAGRAPHS

4. Accordingly, IT IS ORDERED that the application of NetCall, Inc., File No. 22810-CD-P/L-01-86, IS GRANTED ON CONDITION THAT within 30 days the application is amended to include the following information: (1) the time of the traffic load survey; (2) the number of two-way mobile stations, tone-only pagers, tone-plus voice pagers and tone digital readout pagers; and (3) if the existing system serves both one-way and two-way units, separate occupied time data for each group, for the same days and hours.

5.This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-214

In the Matters

Revocation of License of

NOMAR VIZCARRONDO
P.O. Box 7324
Caguas, Puerto Rico 00626

Licensee of Station NP4H in the Amateur Radio Service — PR 87039

and

Suspension of License of

NOMAR VIZCARRONDO
P.O. Box 7324
Caguas, Puerto Rico 00626

Amateur Extra Class Radio Operator License

and

Application of

NOMAR VIZCARRONDO
P.O. Box 7324
Caguas, Puerto Rico 00626

For Renewal of Amateur Radio Station License NP4H and Amateur Extra Operator License

and

Revocation of License of — PR 87040

CARLOS M. COLON
B35 2nd St. Jard Carparra
Bayamon, Puerto Rico 00619

Licensee of station WP4U in the Amateur Radio service

and

Suspension of License of

CARLOS M. COLON
B35 2nd St. Jard Carparra
Bayamon, Puerto Rico 00619

Amateur Extra Class Radio Operator License

and

Revocation of License of

RAMON R. SANTOS VAZQUEZ — PR 87041
Cascada 9 M Rivera
Guaynabo, Puerto Rico 00657

Licensee of Station KP4FW in the Amateur Radio Service

and

Suspension of License of

RAMON R. SANTOS VAZQUEZ
Cascada 9 M Rivera
Guaynabo, Puerto Rico 00657

Amateur Extra Class Radio Operator License

Revocation of License of

ELLIE J. RIVERA DE JESUS — PR 87042
P.O. Box 5981
Caguas, Puerto Rico 00626

Licensee of Station KP4KB in the Amateur Radio Service

and

Suspension of License of

ELLIE J. RIVERA DE JESUS
P.O. Box 5981
Caguas, Puerto Rico 00626

Amateur Extra Class Radio Operator License

and

Revocation of License of

BELINDA RIVERA — PR 87043
P.O. Box 5981
Caguas, Puerto Rico 00626

Licensee of Station WP4FOG in the Amateur Radio Service

and

Suspension of License of

BELINDA RIVERA
P.O. Box 5981
Caguas, Puerto Rico 00626

Technician Class Amateur Radio Operator License

and

Revocation of License of

IRIS Y. RIVERA PR 87044
P.O. Box 5981
Caguas, Puerto Rico 00626

Licensee of Station WP4FOF in the Amateur Radio Service

and

Suspension of License of

IRIS Y. RIVERA
P.O. Box 5981
Caguas, Puerto Rico 00626

Technician Class Amateur Radio Operator License

and

Revocation of License of

RAMON VIZCARRONDO PR 87045
P.O. Box 7324
Caguas, Puerto Rico 00626

Licensee of Station NP4ZN in the Amateur Radio Service

and

Suspension of License of

RAMON VIZCARRONDO
P.O. Box 7324
Caguas, Puerto Rico 00626

Advanced Class Amateur Radio Operator License

and

Revocation of License of

MARGIE VIZCARRONDO PR 87046
P.O. Box 7324
Caguas, Puerto Rico 00626

Licensee of Station WP4GAW in the Amateur Radio Service

and

Suspension of License of

MARGIE VIZCARRONDO
P.O. Box 7324
Caguas, Puerto Rico 00626

Novice Class Amateur Radio Operator License

and

Revocation of License of

IRIS C. LOPEZ PR 87047
P.O. Box 5981
Caguas, Puerto Rico 00626

Licensee of Station NP4ZM in the Amateur Radio Service

and

Suspension of License of

IRIS C. LOPEZ
P.O. Box 5981
Caguas, Puerto Rico 00626

General Class Amateur Radio Operator License

and

Revocation of License of

RICHARD ZAMBRANA PR 87048
7 Tornasol Munoz Rivera
Guaynabo, Puerto Rico 00657

Licensee of Station KP4IN in the Amateur Radio service

and

Suspension of License of

RICHARD ZAMBRANA
7 Tornasol Munoz Rivera
Guaynabo, Puerto Rico 00657

Amateur Extra Class Radio Operator License

and

Revocation of License of

JOAQUIN HERNANDEZ PR 87049
P.O. Box 5963
Caguas, Puerto Rico 00625

Licensee of Station NP4E in
the Amateur Radio Service

and

Suspension of License of

JOAQUIN HERNANDEZ
P.O. Box 5963
Caguas, Puerto Rico 00625

Amateur Extra Class Radio Operator
License

ORDER TO SHOW CAUSE, SUSPENSION ORDER AND DESIGNATION ORDER

Adopted: April 28, 1988; Released: May 3, 1988

1. The Chief, Private Radio Bureau, has under consideration the following amateur radio service station and operator licenses:

(a) Nomar Vizcarrondo: amateur radio station license NP4H and Amateur Extra operator license, granted June 10, 1983.

(b) Carlos M. Colon: amateur radio station license WP4U and Amateur Extra operator license, granted August 5, 1986.

(c) Ramon R. Santos Vazquez: amateur radio station license KP4FW and Amateur Extra operator license, granted November 18, 1983.

(d) Ellie J. Rivera De Jesus: amateur radio station license KP4KB and Amateur Extra operator license, granted September 2, 1986.

(e) Belinda Rivera: amateur radio station license WP4FOG and Technician operator license, granted July 29, 1986.

(f) Iris Y. Rivera: amateur radio station license WP4FOF and Technician operator license, granted July 29, 1986.

(g) Ramon Vizcarrondo: amateur radio station license NP4ZN and Advanced operator license, granted November 18, 1986.

(h) Margie Vizcarrondo: amateur radio station license WP4GAW and Novice operator license, granted September 2, 1986.

(i) Iris C. Lopez: amateur radio station license NP4ZM and General operator license, granted September 16, 1986.

(j) Richard Zambrana: amateur radio station license KP4IN and Amateur Extra operator license, granted September 10, 1985.

(k) Joaquin Hernandez: amateur radio station license NP4E and Amateur Extra operator license, granted April 26, 1985.

In addition, the Chief, Private Radio Bureau, has under consideration, the application of Nomar Vizcarrondo filed January 7, 1988, to renew his license for amateur station NP4H and his Amateur Extra operator license.

2. Information before the Commission indicates that Ramon Vizcarrondo obtained a General amateur operator license and subsequently an Advanced amateur operator license by fraudulent means, in apparent willful and repeated violation of Section 97.129 of the Commission's Rules, 47 C.F.R. § 97.129.[1] The information further indicates that Ramon R. Santos Vazquez, Richard Zambrana and Carlos M. Colon assisted him by certifying as volunteer examiners at an examination given August 16, 1986, in Guaynabo, Puerto Rico that he had passed the examination elements required for a General amateur operator license when, in fact, he had not been examined. The information also indicates that Ramon R. Santos Vazquez, Ellie J. Rivera De Jesus and Joaquin Hernandez further assisted Ramon Vizcarrondo by certifying as volunteer examiners at an examination given October 4, 1986, in Guaynabo, Puerto Rico, that he had passed the examination elements required for an Advanced operator license when, in fact, he had not been examined. It also appears that Nomar Vizcarrondo assisted Ramon Vizcarrondo by procuring false certifications by the volunteer examiners. The assistance rendered by Santos Vazquez, Zambrana, Colon, Rivera De Jesus, Hernandez and Nomar Vizcarrondo was in apparent willful violation of Sections 97.33 and 97.129 of the Commission's Rules, 47 C.F.R. §§ 97.33 and 97.129.[2] Santos Vazquez, Zambrana, Colon, Rivera De Jesus and Hernandez apparently misrepresented material facts to the Commission by their false certifications on the application forms (FCC Form 610) of Ramon Vizcarrondo.

3. The information before the Commission also indicates that Iris C. Lopez obtained a General amateur operator license by fraudulent means, in apparent willful violation of Section 97.129 of the Commission's Rules, 47 C.F.R. § 97.129. The information further indicates that Ramon R. Santos Vazquez, Richard Zambrana and Nomar Vizcarrondo assisted her by certifying as volunteer examiners at an examination given August 16, 1986, in Guaynabo, Puerto Rico, that she had passed the examination elements required for a General amateur operator license when, in fact, she had not been examined. The information also indicates that Ellie J. Rivera De Jesus assisted Iris C. Lopez by procuring false certifications by the volunteer examiners. The assistance rendered by Santos Vazquez, Zambrana, Nomar Vizcarrondo and Rivera De Jesus was in apparent willful violation of Sections 97.33 and 97.129 of the Commission's Rules, 47 C.F.R. §§ 97.33 and 97.129. Additionally, Santos Vazquez, Zambrana, and Nomar Vizcarrondo apparently misrepresented material facts to the Commission by their false certifications on the application form (FCC Form 610) of Iris C. Lopez.

4. Information before the Commission also indicates that Iris Y. Rivera and Belinda Rivera obtained General amateur operator licenses [3] by fraudulent means, in appar-

ent willful violation of Section 97.129 of the Commission's Rules, 47 C.F.R. § 97.129. The information further indicates that Nomar Vizcarrondo, Ramon R. Santos Vazquez and Carlos M. Colon, assisted them by certifying as volunteer examiners that they had passed the required elements at an examination given August 30, 1986, in Guaynabo, Puerto Rico, when, in fact, they had not been examined; and that Colon was not present at the examination. The information further indicates that Ellie J. Rivera De Jesus assisted Iris and Belinda Rivera by procuring false certifications by the volunteer examiners. The assistance rendered by Nomar Vizcarrondo, Santos Vazquez, Colon and Rivera De Jesus was in apparent willful violation of Sections 97.33 and 97.129 of the Commission's Rules, 47 C.F.R. §§ 97.33 and 97.129. Additionally, Nomar Vizcarrondo, Santos Vazquez and Colon apparently misrepresented material facts to the Commission by their false certifications on the application forms (FCC Form 610) of Iris Y. Rivera and Belinda Rivera.

5. The information before the Commission also indicates that Margie Vizcarrondo obtained an amateur station license (WP4GAW) and a Novice operator license by fraudulent means, in apparent willful violation of Section 97.129 of the Commission's Rules, 47 C.F.R. § 97.129. The information further indicates that Ramon R. Santos Vazquez assisted her by certifying as the volunteer examiner that she had passed the examination elements required for a Novice license when, in fact, she had not been examined.[4] The assistance rendered by Santos Vazquez was in apparent willful violation of Sections 97.33 and 97.129 of the Commission's Rules, 47 C.F.R. §§ 97.33 and 97.129. Additionally, Santos Vazquez apparently misrepresented material facts to the Commission by his false certification on the application form (FCC Form 610) of Margie Vizcarrondo.

6. Section 312(a)(1) of the Communication Act of 1934, as amended (the Act), 47 U.S.C. § 312(a)(1), gives the Commission authority to revoke station licenses for false statements. Section 312(a)(2) of the Act, 47 U.S.C. § 312(a)(2), gives the Commission authority to revoke station licenses for matters coming to its attention which would have prevented granting the original application. Section 312(a)(4) of the Act, 47 U.S.C. § 312(a)(4), gives the Commission authority to revoke station licenses for willful or repeated violation of the Act or rules. Section 303(m)(1)(A) of the Act, 47 U.S.C. § 303(m)(1)(A), gives the Commission authority to suspend a radio operator license for violation of the Act or rules. Section 303(m)(1)(F) of the Act, 47 U.S.C. § 303(m)(1)(F), gives the Commission authority to suspend radio operator licenses for obtaining or attempting to obtain an amateur operator license by fraudulent means. Section 309(e) of the Act, 47 U.S.C. § 309(e), requires the Commission to designate an application for hearing if it is unable to find that granting the application would serve the public interest, convenience and necessity.

7. The captioned licensees ARE ORDERED under Sections 312(a)(1), (2) and (4) and 312(c)[5] of the Act, 47 U.S.C. §§ 312(a)(1), (2) and (4) and 312(c), to present evidence why their amateur station licenses should not be revoked. Licensees wishing to present evidence at an evidentiary hearing before an Administrative Law Judge must request a hearing within 30 days from the release of this order. If such a request is made, a time, place and Presiding Judge will be designated by later order. For any licensee who does not request a hearing the FCC staff will determine, without a hearing, whether revocation is warranted and will consider any written statement submitted by that licensee. Forms and envelopes are enclosed with the copies of this *Order* served on the captioned licensees for their replies.

8. Additionally, the captioned amateur operator licenses are hereby SUSPENDED, under Sections 303(m)(1)(A) and (F) of the Act, 47 U.S.C. §§ 303 (m)(1)(A) and (F), for the remainder of their terms. The suspensions will be held in abeyance (until the case is decided) for licensees who, within 30 days of receiving this order, request a hearing or submit a written statement concerning the suspension matter. For licensees who do not request a hearing or submit a written statement, the suspensions will take effect 30 days after their receipt of this *Order*.[6]

9. Furthermore, the application of Nomar Vizcarrondo to renew his amateur licenses is hereby designated for hearing pursuant to Section 309(e) of the Act, 47 U.S.C. § 309(e). If Nomar Vizcarrondo desires to present evidence at a hearing, he must a file a notice of appearance within 30 days from the release of this *Order*. Failure to do so will result in dismissal of his application.

10. Based upon the above information, this case will be decided upon the following issues:

(a) To determine whether Ramon Vizcarrondo, Iris C. Lopez, Iris Y. Rivera, Belinda Rivera and/or Margie Vizcarrondo obtained amateur licenses by fraudulent means, in willful and/or repeated violation of Section 97.129 of the Commission's Rules, 47 C.F.R. § 97.129.

(b) To determine whether Nomar Vizcarrondo, Ellie J. Rivera De Jesus, Ramon R. Santos Vazquez, Richard Zambrana, Carlos M. Colon and/or Joaquin Hernandez assisted others in obtaining amateur licenses by fraudulent means, in willful and/or repeated violation of Sections 97.33 and/or 97.129 of the Commission's Rules, 47 C.F.R. §§ 97.33 and 97.129 .

(c) To determine whether Nomar Vizcarrondo, Ellie J. Rivera De Jesus, Ramon R. Santos Vazquez, Richard Zambrana, Carlos M. Colon and/or Joaquin Hernandez misrepresented material facts to the Commission.

(d) To determine whether Nomar Vizcarrondo, Ramon Vizcarrondo, Margie Vizcarrondo, Ellie J. Rivera De Jesus, Iris C. Lopez, Iris Y. Rivera, Belinda Rivera, Ramon R. Santos Vazquez, Richard Zambrana, Carlos M. Colon and Joaquin Hernandez are qualified to remain amateur radio station licensees.

(e) To determine whether any or all of the captioned amateur station licenses should be revoked.

(f) To determine whether the operator license suspensions imposed by this *Order* should be affirmed, modified or dismissed.

(g) To determine, in light of the foregoing issues, whether granting Nomar Vizcarrondo's application would serve the public interest, convenience and necessity.

11. It appears that the captioned proceedings involve related facts and substantially the same issues and that consolidation for hearing will best conduce to the proper

dispatch of business and the ends of justice. Therefore, the captioned proceedings are hereby CONSOLIDATED for hearing pursuant to Section 1.227 of the Commission's Rules, 47 C.F.R. § 1.227. *See also* 47 U.S.C. § 154(j).

12. A copy of this *Order* shall be sent by Certified Mail – Return Receipt Requested – and by First Class Mail to each licensee at his or her address of record as shown in the caption. Any questions about this matter should be directed to Mr. Fitz-Gibbon or Mr. Borkowski at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Chief, Private Radio Bureau
By:

Robert H. McNamara
Chief, Special Services Division

FOOTNOTES

[1] Section 97.129 provides: "No licensed radio operator or other person shall obtain, or assist another to obtain or attempt to obtain, an operator license by fraudulent means."

[2] Section 97.33 states in pertinent part: "No volunteer examiner shall give or certify any examination by fraudulent means or for monetary or other considertion. Violation of this provision may result in the revocation of the amateur radio station license and the suspension of the amateur radio operator license of the volunteer examiner . . . ."

[3] The grants of General operator licenses and of station licenses WP4AM and WP4AN to Iris Y. Rivera and Belinda Rivera, respectively, were voided by the Commission in its letters of October 1, 1987, when it became known that one of the volunteer examiners certifying their applications was not present at the examination session. Those letters returned their operator status Technician and their station call signs to WP4FOF and WP4FOG, respectively. (Section 97.28(a) of the Commission's Rules, 47 C.F.R. § 97.28(a), requires that an amateur radio operator examination above the Novice class must be administered by three accredited volunteer examiners.)

[4] Unlike the more structured amateur operator examinations above the Novice class which require three administering volunteer examiners, Novice operator examinations at the time Margie Vizcarrondo obtained her amateur licenses required only one administering volunteer examiner. (Novice operator examinations now require two administering volunteer examiners.)

[5] Section 312(c) specifies procedural requirements for Order to Show Cause proceedings.

[6] Any contrary provisions of Section 1.85 of the Commission's Rules, 47 C.F.R. § 1.85, are hereby waived.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LARRY HARLESS

Against

WOWK-TV
Huntington, West Virginia

WSAZ-TV
Huntington, West Virginia

WCHS-TV
Charleston, West Virginia

WOAY-TV
Oak Hill, West Virginia

STAFF RULING

Adopted: May 2, 1988; Released: May 2, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a complaint by Larry Harless and the Mountaineers With Harless for Governor Committee (Complainant), received April 25, 1988, against stations WOWK-TV and WSAZ-TV, Huntington, West Virginia, station WCHS-TV, Charleston, West Virginia, and station WOAY-TV, Oak Hill, West Virginia. Essentially, Complainant alleges that the licensees' refusals to sell him 30-minute programs within specifically requested time periods are in violation of Section 315(a) of the Communications Act (47 U.S.C. Section 315 (a)), the Commission's rules, and the U.S. Constitution. In light of the statute and Commission precedent, the complaint will be denied.

2. Complainant represents that he is "a legally qualified and certified candidate for Governor of West Virginia in the Democratic primary election to be held in West Virginia on May 10, 1988." Complainant states that at various times during March and April of 1988 he, or one acting on his behalf, sought to purchase a 30-minute block of time on each of the above-mentioned television stations. Specifically, time between 7:00 and 10:00 p.m. during the week, or alternatively, between 4:30 and 6:00 p.m. on Saturday or Sunday, was requested in order to telecast a 30-minute program regarding Harless' candidacy for Governor of West Virginia. The Complainant states that one or more of the named television stations have sold 30-minute programs to gubernatorial candidates in prior elections. According to Complainant, each of the stations refused to sell him a 30-minute block as requested. Instead, Complainant explains that stations WCHS-TV and WOAY-TV offered spots of no more than one minute, and stations WOWK-TV and WSAZ-TV offered a 30-minute block at times different from those requested.

3. In particular, Complainant claims that: (1) the stations' failures to afford equal opportunities are in violation of Section 315; (2) their actions, in effect, constitute censorship over the material sought to be telecast, in violation of the no-censorship provision of Section 315 and in contravention of the First Amendment; (3) their actions "constitute monopolistic, discriminatory, and unfair practices" toward the candidate and the citizens of West Virginia; and (4) as a consequence of their actions, the voters of West Virginia are being deprived of their First and Fourteenth Amendment rights to be adequately informed of the views of a legally qualified candidate.

4. Complainant concludes that by refusing to accord him the requested access to disseminate his message in the manner he believes appropriate, West Virginians must effectively base their choice of Governor upon meaningless 30-second or one-minute advertising spots. Complainant asks that the Commission order the named licensees to sell him one or more 30-minute blocks of time between 7:00 and 10:00 p.m., or alternatively, between 4:30 and 6:00 p.m. on Sunday, to be telecast at least one week before the May 10, 1988, primary election.

DISCUSSION

5. State and local candidates have no initial right of access to any broadcast station. *Warren J. Moity, Sr.*, 88 FCC 2d 580 (1979), *rev. denied*, FCC 80-438, 7-23-80. Only candidates for *federal* elective office, under Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312 (a)(7)), possess an affirmative right of access to the use of broadcast facilities. Except for this mandated access requirement for federal candidates, the Supreme Court has held that the Constitution does not impose any "right of access on the broadcast media." *CBS v. Democratic National Committee*, 412 U.S. 94, 128 (1973); *Branch v. FCC*, 824 F.2d 37, 48 (D.C. Cir. 1987), *cert. denied*, U.S. (1988).

6. Section 312(a)(7) has been interpreted to require licensees to sell program as well as spot broadcast time to federal candidates. *See CBS v. FCC*, 453 U.S. 367 (1981). However, no similar right of access to either program or spot time is guaranteed to state or local candidates. "The licensee in its own good-faith judgment in serving the public interest may determine which [state and local] political races are of greatest interest and significance to its service area, and therefore may refuse to sell time to candidates for less important offices, provided it treats all candidates for such offices equally." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 535 (1972). Once a licensee decides to cover a particular state or local election, the broadcaster also has the discretion to decide what kind and what amount of time to make available. Because state and local candidates do not have a right to demand program-length periods, we can take no action against those stations which have offered Complainant time, albeit not the exact time requested.

7. As to those television stations which Complainant states have sold 30-minute programs to gubernatorial candidates in prior elections, those programs create no subsequent right for Complainant in later elections. As long as a licensee does not discriminate between competing candidates (*See* 47 C.F.R. Section 73.1940(c)), there is no obligation to sell specific blocks of time. The complaint contains no allegation that discrimination between can-

didates has occurred. Thus, no further Commission action is warranted on Complainant's assertion that the licensees are discriminating against him.

8. Based on the above, we cannot conclude that stations WOWK-TV, WSAZ-TV, WCHS-TV or WOAY-TV failed in their obligations under Section 315 of the Communications Act. Also, Complainant furnished no evidence to support a claim that 47 C.F.R. 73.1940(c) has been violated. Accordingly, their refusal to sell Complainant a specific amount of time (30-minutes) during a specific period (weekdays between 7:00 and 10:00 p.m. or weekends between 4:30 and 6:00 p.m.) does not violate Section 315 of the Communications Act, the Commission's rules, or the U.S. Constitution.

9. In view of the foregoing, the complaint IS DENIED.

10. Staff action is taken here under delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

Reference No.

In re Request of	8330-SM
UNITED TELEVISION,	C2-916
INC.,	
Licensee of Television Station KUTP,	
Phoenix, Arizona	

For Declaratory Ruling

STAFF RULING

Adopted: April 8, 1988; Released: May 12, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling filed on February 26, 1988, by United Television, Inc., licensee of television station KUTP, Phoenix, Arizona. KUTP seeks a determination that appearances by legally qualified candidates in news segments of "The Phoenix File" program are exempt from the equal opportunities requirement as "bona fide news interviews" under Section 315(a)(2) of the Communications Act of 1934, as amended. We grant the request and find that "The Phoenix File" is a bona fide news interview program.

2. KUTP states that "The Phoenix File" is a public affairs program which is regularly scheduled on a weekly basis, and is produced and controlled by KUTP. According to KUTP, the program was initiated in January, 1987, to explore "political, cultural, and social issues affecting the Phoenix area." KUTP describes "The Phoenix File" as a half-hour interview program hosted by Dolores Tropiano, broadcast on Saturdays at 7:30 a.m., and repeated on Sundays at 6:30 a.m. Recently interviewed guests have included Ed Buck, leader of the drive to recall Governor Mecham; Kirk Baxter, Director of the Arizona Stop AIDS project; Wilbert Nelson, President of the Phoenix NAACP; Ginny Hildebrand, Director of the Arizona Food Bank; Pat Fullinwinder, Coordinator of the Clean Air Campaign; and Arizona Congressman John Rhodes. KUTP further states that it plans to invite legally qualified candidates for the recall election for Governor of Arizona to appear on the program.

3. KUTP contends that the news interview segments of "The Phoenix File" meet all the criteria for a "bona fide news interview" exemption under Section 315(a)(2) of the Communications Act. As such, KUTP seeks confirmation that it is correct in treating interviews of the candidates as exempted programming which should not be subject to the equal opportunities requirement.

DISCUSSION

4. Section 315 of the Communications Act provides that if a broadcaster permits a legally qualified candidate for public office to "use" a station's facilities, it must afford equal opportunities to all other candidates for that office. In 1959, Congress amended this section in an effort to encourage increased news coverage of political campaign activity. They exempted from the equal opportunities requirement an appearance by a legally qualified candidate on four categories of news programming:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program falls under the "bona fide news interview" exemption, the Commission considers three factors: (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101 (1987).

5. Based on the information provided by KUTP, it appears that the news interview segments of "The Phoenix File" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). The program has been regularly scheduled to air every Saturday and Sunday since January, 1987; the licensee asserts that it is directly responsible for the production and control of the program, which is hosted by a KUTP employee; and KUTP chooses the guests and makes the decisions about the show based on good faith journalistic judgment and newsworthiness, with the intent to provide news and information to KUTP's local audience, not to oppose or advance any candidate.

6. While petitioner states that "The Phoenix File" occasionally features topics that could be characterized as entertainment, this does not preclude the news interview segments of the program from exempt status. *See Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984).

7. In view of the foregoing, it appears that the interviews with legally qualified candidates on "The Phoenix File" may be classified as bona fide news interviews. As such, appearances by legally qualified candidates for public office that are broadcast under the circumstances described in KUTP's pleading will be exempt from the equal opportunities provision of Section 315.

8. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC. File No. I-T-C-88-088

Application for authority to operate as an international resale carrier

TELEPHONE ASSOCIATES LONG DISTANCE SERVICES, INC. File No. I-T-C-88-089

Application for authority to operate as an international resale carrier

AMERICAN COMMUNICATIONS, INC. File No. I-T-C-88-091

Application for authority to operate as an international resale carrier

TELECOMMUNICATIONS SERVICES CORPORATION File No. I-T-C-88-092

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1988; Released: May 12, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering four applications filed on March 16, 8, 8, and 10, 1988, respectively, by Telephone Network, Inc. (TNI), Telephone Associates Long Distance Services, Inc. (TALDS), American Communications, Inc. (ACI), and Telecommunications Services Corporation (TSC), respectively, requesting authority, pursuant to Section 214 of the Communications Act of 1934, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on March 23, 1988. No comments were received.

2. Upon review of the applications, we find that the applicants have the legal, technical and financial qualifications to provide the proposed services. The applicants are already providing domestic resale services and now propose to resell international switched voice services in competition with other carriers already providing resale of such services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by TNI, TALDS, ACI and TSC.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-88-088, I-T-C-88-089, I-T-C-88-091 and I-T-C-88-092 ARE GRANTED; and

a. TNI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. mainland and those points listed in those tariffs;

b. TALDS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1 between the U.S. mainland and those points listed in that tariff;

c. ACI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S. mainland and Canada and Mexico and those points listed in those tariffs; and

d. TSC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and Litel Communications Corporation's Tariff FCC No. 1, between the U.S. mainland and those points listed in these tariffs.

5. Copies of any operating agreements entered into between any of the applicants and its correspondents shall be filed with the Commission within 30 days of their execution.

6. The applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORIONNET, INC. File No. I-T-C-88-078

Application for authority to acquire and operate facilities for service to Ireland, the Netherlands, Sweden and the United Kingdom, and to resell services of other carriers for provision of switched voice service

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1988; Released: May 12, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on February 10, 1988 and supplemented by letter of April 6, 1988 by OrionNet, Inc. (ONI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone service of existing carriers to provide international switched voice service between the U.S. and various overseas points. ONI also requests authority to lease and operate satellite and connecting facilities for the provision of switched voice service to Ireland, the Netherlands, Sweden and the United Kingdom. The application was placed on public notice on March 2, 1988. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. ONI, a Delaware corporation, is a start-up company which proposes to provide direct service as well as resell services of other carriers for the provision of switched voice services to various overseas points. ONI has filed the information required by the Commission in Section 63.01 of its Rules. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interst.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public and specifically direct service to Ireland, the Netherlands, Sweden and the United Kingdom by ONI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-078 IS GRANTED, and ONI is authorized to:

a. provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, and FTC's Tariff FCC No. 23 between the U.S. mainland and those points listed in these tariffs;

b. lease from Comsat and operate twenty-four (24) voice-grade satellite circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Ireland -21 circuits, the Netherlands - one circuit, Sweden - one circuit, and the United Kingdom - one circuit, furnished by ONI's correspondents;

c. lease and operate 24 voice-grade circuits in the east coast earth station;

d. lease and operate necessary domestic connecting facilities; and

e. use the facilities in b., c., and d. above to provide regularly authorized common carrier services, including switched voice and private-line services, between the U.S., on the one hand, and Ireland - 21 circuits, the Netherlands - one circuit, Sweden - one circuit, and the United Kingdom - one circuit, on the other hand, and beyond.

5. ONI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between ONI and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

8. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548 (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MARINE
TELEPHONE
COMPANY

Application for authority to close VHF-FM Public Local Coast Station WHU 653, Memphis, Florida	File No. I-T-D-88-003
Application for authority to close VHF-FM Public Local Coast Station WHU 319, Miami Beach, Florida	File No. I-T-D-88-004

ORDER AND AUTHORIZATION

Adopted: April 27, 1988; Released: May 12, 1988

By the Acting Chief, International Facilities Division:

1. The Commission has before it two applications, filed on February 3, 1988 by Marine Telephone Company (MTC), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM Public Local Coast Stations WHU 653, Memphis, Florida and WHU 319, Miami Beach, Florida. Station WHU 653 primarily serves Memphis, Florida, a small metropolitan community on the west bank of the Terra Ceja Bay, which connects to Tampa Bay near the point where Tampa Bay empties into the Gulf of Mexico. Station WHU 319 serves Miami Beach, a large metropolitan community located on the eastern shore of Florida on the Atlantic Ocean. Both stations serve pleasure craft and commercial vessels. These applications were placed on public notice on February 17, 1988. No comments were received.

2. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action. Application of this standard presents the Commission with the task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application to close station WHU 653, MTC states that the demand for service has been minimal, approximately two calls per week during the past 18 months. MTC will continue to provide service from its station in North Fort Myers, Florida (KYH 550). Service in the area of Memphis is provided by General Telephone Company of Florida at Clearwater (KUZ 385) and by Airsignal International, Inc. at Venice (KTD 563). In addition, cellular service is available to vessels traveling in the Memphis/Tampa Bay area, including that provided by station KNKA 515 operated by Bayphone of Tampa, and station KNKA 227 operated by GTE Mobilephone of Tampa, Inc. Further, MTC states that it cannot come close to covering the expenses of the station, approximately $575 per month.

4. In support of its application to close Station WHU 319, MTC also states that the demand for service has been minimal, approximately two calls per week during the past 18 months. MTC is proposing to relocate its Ft. Lauderdale station (KEW 823) to a higher tower to cover both the Ft. Lauderdale and Miami Beach areas. It will also continue to provide service via its Homestead station (KLU 791). Service to the area will continue to be provided via Southern Bell's station (KSK 279). In addition, service to vessels is provided by cellular stations operating in the Miami area, including station KNKA 364 operated by Florida Cellular Telephone Co., and station KNKA 225 operated by Florida Cellular Service, Inc. Further, MTC states that it is not meeting its cost of approximately $575 per month at this station either.

5. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of service via the instant stations.

6. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-88-003 and I-T-D-88-004 ARE GRANTED, and MTC is authorized to discontinue service via its VHF-FM Public Local Coast Stations WHU 653, Memphis, Florida and WHU 319, Miami Beach, Florida.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 791 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-211

In re Applications of

W. B. MOORE, JR. File No. BPH-861001SY
(hereafter Moore)

J. T. PARKER BROADCASTING CORP. File No. BPH-861001TB
(hereafter Parker)

YEARY BROADCASTING, INC. File No. BPH-861001TC
(hereafter Yeary)

For a Construction Permit for
a New FM Station on
Channel 297A (107.3 MHz)
in Lebanon, VA

HEARING DESIGNATION ORDER

Adopted: April 22, 1988; Released: May 12, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Parker*. On September 1, 1987, Parker submitted a late-filed amendment to its application reflecting a decrease in its originally proposed antenna height of 195 feet, while simultaneously increasing its effective radiated power (ERP) from .054 kilowatts to .060 kilowatts to compensate for the decrease in its proposed antenna height. In the amendment, Parker states that the changes were necessary due to the FAA placing a height restriction of 100 feet at the antenna site. Further, on October 22, 1987, Parker submitted a letter from the FAA dated July 1, 1987 verifying the restriction placed on the site by the FAA. Consequently, good cause has been demonstrated by Parker for filing the late-filed amendment, which will be accepted pursuant to paragraph 4 below.[1]

3. *Yeary*. In response to Section VI of FCC Form 301, Yeary has indicated that it will employ five or more full-time employees. Therefore, Yeary is required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the recruitment sources that the applicant proposes to utilize in recruiting minority and female employees. Yeary failed to submit in its EEO Program examples of minority and female organizations it intends to utilize. Accordingly, Yeary shall amend its application, within 30 days of the release of the Order, by submitting the required information to the presiding Administrative Law Judge.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as or right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Parker	January 5, 1987; September 1, 1987 (Engineering)
Yeary	September 11, 1987

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 2 hereinabove, the objection filed by Yeary IS DENIED.

9. IT IS FURTHER ORDERED, That pursuant to paragraph IV of the applicant's Model EEO Program, Yeary shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, data providing the minority and women's organizations it proposes to utilize in filling job vacancies.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Parker, Yeary.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence to the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An informal objection was filed by Yeary Broadcasting, Inc. alleging that Parker failed to provide the required good cause. The objection will be denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-207

In re Applications of

GREAT LAKES RADIO CORPORATION (hereafter Great Lakes) — File No. BPH-861001SZ

CENTRAL MICHIGAN COMMUNICATIONS, INC. (hereafter Central) — File No. BPH-861002TK

For a Construction Permit for
a New FM Station on Channel 284A
in Mount Pleasant, Michigan

HEARING DESIGNATION ORDER

Adopted: April 21, 1988; Released: May 12, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Late-Filed Amendment. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT
Central	March 8, 1988

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

APPLICANT: Central

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-213

In re Applications of

EMPIRE BROADCASTING, INC. (hereafter EBI)	File No. BPH-870311MB
SAMCOM, LTD. PARTNERSHIP (herafter Samcom)	File No. BPH-870311MC
NEHEMIAH RADIO PRODUCTIONS, INC. (hereafter Nehemiah)	File No. BPH-870311MD
KIRKWOOD BROADCASTING, INC. (hereafter KBI)	File No. BPH-870311MK

For Construction Permit for
New FM Station, Channel 270C2,
Sioux Falls, South Dakota.

HEARING DESIGNATION ORDER

Adopted: April 22, 1988; Released: May 12, 1988

By the Chief, Audio Services Division

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *EBI.* This applicant failed to indicate whether the construction of its proposed tower would constitute a major or minor environmental action (Section V-B, Item 16 of FCC Form 301). While EBI provided in the engineering section of its application a written statement which indicates that there will be no significant environmental impact, the applicant will be required to file a corrective amendment as stated in the appropriate ordering clause.

3. *Kirkwood.* On January 21, 1987, Kirkwood filed with the Commission an application (File No. BPCT-871201KI) for construction permit for a new UHF television station in Sioux Falls, South Dakota, which was subsequently granted on September 18, 1987. Because both the UHF television and the instant FM applications propose to serve the city of Sioux Falls, a question is raised concerning compliance with the Commission's "one-to-a-market" multiple ownership rule, 47 C.F.R. Section 73.3555(b)(2). Kirkwood requested acceptance of its application pursuant to Note 4 of Section 73.3555, which permits determination "on a case-by-case stations in question would be in the public interest." However, Kirkwood has failed to provide showing in support of its request. Accordingly, an appropriate issue will be specified.[2]

4. *Other Matters.* The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Kirkwood	September 17, 1987
	October 19, 1987
	November 24, 1987

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED That pursuant to 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Kirkwood, whether the applicant's interest in the application for construction permit for a new UHF station to serve Sioux Falls, South Dakota, (File No. BPCT-871201KI) and in the new FM station proposed here, are consistent with Section 73.3555 of the Commission's Rules, and, if not, whether common ownership is in the public interest.

2. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, EBI shall submit Section V-B, Item 16 information, indicating whether or not the application, if granted, would be a major action as defined by Section 1.1305 of the Commission's Rules to the Administrative Law Judge.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Branch, Audio Services Division, Mass Media Bureau.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein, shall, pursuant to Section

1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Two other applications for this frequency were previously returned:

Jeffco, (File No. BPH-870311MO) was returned December 15, 1987 and Verna Joy Spriggs (File No. BPH-870311ML) was returned December 21, 1987. Neither applicant has filed a timely petition for reconsideration.

[2] Since the "Note 4 exception" to 47 C.F.R. Section 73.3555 permits common ownership of an FM and UHF in these circumstances, and since the applicant has specifically requested a Note 4 exception, the provisions of the Commission's inconsistent application rule, 47 C.F.R. Section 73.3518, are not applicable. *See Big* Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-209

In re Applications of

TIMOTHY D. MARTZ (hereafter Martz) — File No. BPH-870817MH

David J. Alteri *et. al.*, d/b/a CAPE AL BROADCASTING LTD. (hereafter Alteri) — File No. BPH-870819ND

For a Construction Permit for a New FM Station on Channel 274A, Cape Vincent, New York

HEARING DESIGNATION ORDER

Adopted: April 22, 1988; Released: May 12, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Martz	October 2, 1987; January 20, 1988; February 22, 1988

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if either.

6. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Martz.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-212

In re Applications of

Roy E. Henderson d/b/a SPANISH AURAL SERVICES COMPANY (hereafter Spanish)	File No. BPH-850712R1
BETTY HOWELL (hereafter Howell)	File No. BPH-850712S9
R & C MINORITY TELECOMMUNICATE INC. (hereafter R & C)	File No. BPH-850712U6
NINA JEAN RUBINSKY (hereafter Rubinsky)	File No. ARN-850709MO (PREVIOUSLY DISMISSED)
MICHELE SANCHEZ (hereafter Sanchez)	File No. ARN-850711PR (PREVIOUSLY DISMISSED)
MR. ROBERT G. KERRIGAN (hereafter Kerrigan)	File No. ARN-850712Q9 (PREVIOUSLY DISMISSED)
ISLAND RADIO OF TEXAS (hereafter Island)	File No. ARN-850712S7 (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
in South Padre Island, Texas
Channel 224A (92.7 MHz)

HEARING DESIGNATION ORDER

Adopted: April 26, 1988; Released: May 12, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

PRELIMINARY MATTERS

2. On November 18, 1985, the FM Branch returned as unacceptable for filing the applications filed by Rubinsky, Sanchez, Kerrigan and Island. The Rubinsky, Kerrigan and Island applications were returned for violating Article 5 of the United States-Mexican Agreement of 1972, limiting Class A stations within 320 kilometers (199 miles) of the U.S.-Mexican border to a maximum antenna height above average terrain (HAAT) of 90 meters (300 feet). Sanchez's application was returned for exceeding the 15 dB maximum to minimum ratio permitted by Section 73.316(c) of the Commission's Rules for directional antenna systems. All four applicants petitioned for reconsideration and requested reinstatement of their respective applications. Rubinsky, Kerrigan and Island have requested that such reinstatement be accompanied by an appropriate amendment of their HAAT.

3. *The Rubinsky, Kerrigan and Island Reconsiderations.* In substance, Rubinsky, Kerrigan and Island variously contend:

> (1) that the specification of a transmitting antenna 100 meters (328 feet) HAAT complied with Section 73.211(b) and was consistent with the South Padre Island Rule Making proceeding *Rubinsky Reconsideration*, at page 2.
>
> (2) that insufficient public notice "was given that applications for this channel would be ineligible for the liberalized FM rules recently adopted by the Commission." *Island Reconsideration*, at paragraph 3;
>
> (3) these returns are "the result of the Commission's change in its rules from feet to meters, and rounding off to the nearest convenient metric unit." *Kerrigan Reconsideration*, at page 2.
>
> (4) that Island's proposal conforms to a provision in the U.S.-Mexican Agreement barring Class A facilities "from having a 1 mV/m contour that extends for more than 15 miles in any direction." *Island Reconsideration, supra.*

4. We reject the petitioners' contentions. The *1985* South Padre Island Rule Making specifically noted that the allocations (Channels 224A and 237A) were "in compliance with minimum distance separation and other technical requirements of the Rules."[2] *Report and Order* in MM Docket 84-377, 50 Fed. Reg. 8331 (1985). These technical requirements include the provisions in Sections 73.204 and 73.1650 of the Commission's Rules concerning the U.S.-Mexican Agreement. These rules are clearly defined and consistent: they indicate that international agreements may restrict the use of some channels, which agreements are relevant and where they may be purchased or inspected. Further, explicit notice of the applicability of the U.S.-Mexican Agreement was published in the Federal Register two years *prior* to the filing of the first application in this proceeding, cautioning applicants that Class A facilities within 320 kilometers (199 miles) of the U.S.-Mexican border must conform to the 300-foot maximum HAAT. *Report and Order* in BC Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983).

5. Island's claim that the Agreement restricts facilities on the basis of the size of their contour is also incorrect. Article 3(B)(20) of the Agreement *defines* "a theoretical protected service range" resulting for each class of station operating with the maximum parameters (effective radiated power, antenna height above average terrain, and minimum distance separation); Articles 5 and 6 list the parameters required for the affected facilities. If the Commission embraced the concept of a "protected contour" in this matter, it would signal a return to the case-by-case analysis of an applicant's technical proposal (including precise determinations of contour locations) discarded by

the Commission over 25 years ago as inefficient and burdensome. *First Report and Order* in Docket 14185, 40 FCC 662, 666 (1962).

6. Finally, Rubinsky, Kerrigan and Island argue that they should now be permitted to amend their applications to comply with the Mexican agreement. We reject this remedy. As with the power/height limits imposed by the agreement, adequate notice was provided of the modified FM processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), released two months *prior* to the filing of the first application in this proceeding. Under the new processing rules adopted in Docket 84-750, applicants may amend as of right during the appropriate filing window and (for amendments going to acceptability/grantability matters) for a thirty-day period following the Commission's issuance of a *Public Notice* announcing the acceptance of the applications for tender. *Report and Order*, *supra*, at 19941. The last date for such amendments as of right in this proceeding was September 23, 1985. [3] Since no applicant timely filed corrective amendments, no grounds exist that would justify a deviation from the Commission's FM processing standards. Permitting corrective amendments at this stage would necessitate new engineering studies of the applications, thereby undermining the goal of the new processing rules by inordinately delaying new broadcast service to South Padre Island, and would be unfair to those applicants in this proceeding who have filed acceptable proposals. *Kerrville Radio, A Limited Partnership*, FCC Rcd 3441, 3443 (1987). Accordingly, Rubinsky, Kerrigan and Island's petitions for reconsideration will be denied.

7. *The Sanchez Reconsideration*. Sanchez seeks reconsideration of the return of her application as unacceptable for filing for proposing a maximum to minimum antenna radiation ratio of 26 dB, significantly in excess of the 15 dB permitted by 47 C.F.R. § 73.316. Sanchez argued in her pleading that "the actual relative horizontal gain is 13.9 dB," and that "the Commission improperly focused upon supplementary data in determining that the application was unacceptable."

8. In her petition for reconsideration, Sanchez's engineering statement characterizes the parameters submitted (Exhibit VB-1 of the tendered application) as "predicted" or "calculated," as contrasted with the pattern "in practice" (shown in Exhibit VB-2 of its tendered application). According to the applicant's technical consultant, the drawback to defining the *predicted* pattern is that it would have nulls approaching infinity between the major lobes of the pattern. In *practice*, Sanchez's consultant claims, "the tower itself is a reflective element and fills in these nulls." The parameter sheet containing the supplementary data "identified artificial limitations to keep the computer from experiencing difficulty when assessing the patterns near-infinite null between the major lobes." Sanchez correctly states that the modified antenna relative pattern attached as Figure 1 of the reconsideration shows that the proposed antenna will satisfy 47 C.F.R. § 73.316(c).

9. We reject Sanchez's argument. The staff correctly identified the violation of 47 C.F.R. § 73.316(c). The antenna manufacturer's data sheet attached as Exhibit VB-1 of the tendered application indicates a maximum-to-minimum ratio of approximately 28 dB, clearly exceeding the 15 dB limit of the rule. Further, a reading of the relative field values from the radiation pattern (Exhibit VB-2) provided in the tendered application shows the minimum value to be -23.19 dBk (when converted to dBk). These values confirm the 28 dBk maximum to minimum value. The pattern submitted in the petition for reconsideration represents a belated attempt to amend the original defective application. While we do not dispute what the originally submitted pattern may have achieved in practice, we can only conclude that the original pattern violated the rule. Accordingly, Sanchez's petition will be denied.

HOWELL

10. Howell proposes to locate her transmitter antenna on top of an existing building at 5101 Laguna Boulevard on South Padre Island. Our study indicates that this proposal may exceed the radio frequency guidelines under 47 C.F.R. § 1.1307(b). Since her proposal may therefore have a significant environmental impact as defined by Section 1.1307, Howell is required to submit the environmental impact information described in Section 1.1311, specifically demonstrating compliance with the RF radiation guidelines noted in the OST Bulletin No. 65 entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation" (October, 1985). Accordingly, Howell will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

R & C

11. *Late - filed Amendments*. R & C petitioned on September 25, 1985, April 24, 1986 and December 10, 1987 for leave to amend its application. The accompanying amendments were filed after September 23, 1985, the last day for filing minor amendments as of right in this proceeding. R & C's 1985 amendment provided an executed copy of its September 23rd statement that the applicant would "provide a significant amount of Spanish-language programming, to address the needs and interests of the Hispanic population of the South Padre Island area." The 1986 and 1987 amendments updated the applicant's broadcast interests; only the former, however, was executed in compliance with the requirements of 47 C.F.R. § 73.3513. R & C has not provided a good cause showing warranting acceptance of either its 1985 or its 1987 amendments, and both (along with the former's unsigned September 23, 1985 predecessor) will be returned. The April 24, 1986 amendment updating the broadcast interests of one of R & C's principals shall be accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from this amendment will be disallowed.

12. *Petition to Deny*. On January 3, 1986, Island petitioned to deny R & C's application, alleging that R & C "checked no box on page one of Form 396-A" and that its application was therefore incomplete and "should not have been accepted for filing." Island also alleges that R &

C lacks reasonable assurance of the availability of its proposed site atop the Hilton Hotel on South Padre Island since assurances were received only from the owner of the tower atop the Hilton's roof and not from the hotel itself. Finally, Island alleges that state law prohibits R & C principal Cleotilde Rangel from holding simultaneously the corporate offices of both president and secretary.

13. The box on page one of FCC Form 396-A is a duplicate of Section VI, Item 1, which R & C completed by indicating that it proposed to employ five or more fulltime employees. Further, R & C has provided a satisfactory model equal employment opportunity program. Finally, Island has provided no documentation and/or affidavits supporting its allegations concerning the restrictions of Texas state law and the lack of assurance from the responsible parties for location of R & C's proposed antenna atop the South Padre Island Hilton Hotel. Without requisite evidence, the Commission has nothing to act upon and cannot specify any appropriate issue for hearing. *Cf. Dale A. Owens, Hearing Designation Order* in MM Docket 87-583 (released January 20, 1988). Accordingly, Island's petition will be denied.

OTHER MATTERS

14. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Howell, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Rubinsky, Sanchez, Kerrigan and Island ARE DENIED.

18. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Howell shall submit the environmental assessment required by Section 1.1311 of the Commission's Rules to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That the petition by R & C filed April 24, 1986 for leave to amend IS GRANTED, the corresponding amendment IS ACCEPTED to the extent indicated herein, but that the petitions for leave to amend filed **September 25, 1986** and **December 10, 1987** ARE DENIED and the corresponding amendments ARE RETURNED.

20. IT IS FURTHER ORDERED, That the petition to deny filed by Island against R & C IS DENIED.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Pursuant to the applicant's request filed March 14, 1988, the application (File No. BPH-850712R2) filed by Star Signal Corporation was dismissed on March 16, 1988.

[2] The applications for South Padre Island on Channel 237A (95.3 MHz) have recently been designated for comparative hearing. *Susan Lundborg*, 3 FCC Rcd 1 (1988).

[3] The referenced applications were listed as acceptable for tender on public notices (Report Nos. 13439, 13441 and 13442) released August 20, 21 and 22, 1985. The thirty-day period for amendments going to acceptability/grantability matters commenced from the last of these notices.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-224

In re applications of

BRIAN D. WARNER AND MARK D. HUMPHREY d/b/a BRIMARK BROADCASTING (hereafter Brimark)	File No. BPH-870330MR
VESTAL COMMUNITY BROADCASTERS, INC. (hereafter VCBI)	File No. BPH-870331MC
MARY C. MURRAY (hereafter Murray)	File No. BPH-870331MH
DAVID G. MITCHELL (hereafter Mitchell)	File No. BPH-870331MJ
MOLLY A. WALTMAN (hereafter Waltman)	File No. BPH-870331MR
WILTSHIRE BROADCAST CO. (hereafter Wiltshire)	File No. BPH-870331OT
CAROL A. MORGAN (hereafter Morgan)	File No. BPH-870422MD
SHERLOCK - HART BROADCASTING, INC. (hereafter Sherlock-Hart)	File No. BPH-870422MH
KRB ASSOCIATES (hereafter KRB)	File No. BPH-870422MK
MANUEL ANGELO (hereafter Angelo)	File No. BPH-870330MW (DISMISSED HEREIN)
JOHN ANTHONY BULMER (hereafter Bulmer)	File No. BPH-870421MB (DISMISSED HEREIN)

For a Construction Permit
For a New FM Station
in Vestal, New York
at Channel 277A

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released: May 12, 1988

By the Chief, Audio Services Division,

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On February 12, 1988, Angelo filed a Motion to Dismiss its application for a new FM facility in Vestal, New York. That motion will herein be granted.

3. On March 17, 1988, Bulmer filed a Motion to Dismiss its application for a new FM facility in Vestal, New York. That motion will herein be granted.

4. *Site Elevation Discrepancies*. All of the applicants have proposed to mount their antennas on the same existing tower which is currently authorized by the Commission for WSKG-TV, WICZ-TV, WAAL(FM), WSKG-FM and WUCI-FM. Each applicant lists the overall tower height above ground level as 934 feet (284.7 meters); however, the values for the overall tower height above mean sea level (AMSL) range from 2554 feet (778.5 meters) to 2564 feet (781.5 meters). Therefore, a discrepancy exists as to the site elevation. Data on file with the Commission for the tower is consistent with an overall tower height AMSL of 2564 feet; however, as KRB points out in its application, the National Oceanic and Atmospheric Administration (NOAA) Obstruction List shows a 5 foot difference in both latitude and longitude (NL 42' 03' 23", WL 75' 56' 40) for the same tower. All applicants are therefore requested to verify site elevation and coordinates and amend accordingly.

5. *City - Grade Coverage*. All of the applications filed in the Vestal, New York proceeding, with the exception of the application filed by Bulmer, failed to propose full coverage of the area within the city boundaries of Vestal as required by the city coverage rule, 47 C.F.R. § 73.315. Applicants VCBI, Murray, Mitchell and Waltman all certify in Section V-B, Item 11, that their respective contours completely encompass the principal community, while their respective contour maps illustrate that the entire community is not served. Brimark, Wiltshire, Sherlock-Hart and KRB all answer "no" in Section V-B, Item 11. Brimark, VCBI, Mitchell, Wiltshire, Morgan, Sherlock-Hart and KRB all file requests for a waiver of 47 C.F.R. § 73.315. Murray and Waltman do not request waivers. However, the Commission no longer requires a waiver of 47 C.F.R. § 73.315(a) when more than 80% of the community of license will be served within the 3.16 mV/m contour. *See John R. Hughes, Inc.*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Since it is readily apparent that all applicants--both those that submit waiver requests and those that do not--do cover more than 80% of Vestal, New York, waiver requests are not necessary and thus the waivers filed will be dismissed as moot.

6. Although requesting his application be dismissed, Bulmer requests that his Petitions to Return or Dismiss Applicants Angelo, VCBI and Murray still be considered. Since Bulmer is no longer a party of interest in the Vestal, New York proceeding, his petitions must be treated as objections filed by a member of the public. Bulmer's Petition, which makes the same allegations against all

three applicants, alleges that the applicants fail to clearly "depict the legal boundaries of Vestal" as required by Section V- B, Item 16 of FCC Form 301 and by Appendix D of the *Report and Order* in MM Docket No. 84-750. Bulmer continues that since the applications all contain this flaw, they must be returned as insufficient for tender.

7. Since Angelo's application is dismissed herein upon Angelo's own motion, the Petition to Return filed against Angelo will be dismissed as moot.

8. VCBI and Murray both filed timely Oppositions to Bulmer's Petition. VCBI asserts in its opposition that Vestal has no legal boundaries. VCBI argues that within Broome County, New York, there is a "town of Vestal" which is made up of the "community of Vestal," East Vestal, Vestal Center, Tracy Creek and Ross Corners. VCBI argues that its contour map clearly showed the community of Vestal within the 70 dBu contour. We find there is a genuine issue as to whether the community to be served by the Vestal allocation is the larger area referred to as the "town of Vestal" or the smaller area referred to as the "community of Vestal." There being a legitimate question, the Commission cannot penalize an applicant and return it as untenderable for protraying the smaller community on its contour map. The Commission, in comparable situations, has designated the issue of which community is to be served for hearing. *See George Henry Clay*, MM Docket 87- 567, Released January 7, 1988. However, the Commission in this case finds it unnecessary to designate an issue as the point is mooted by the fact that regardless of whether the correct boundaries are that of the town of Vestal or the community of Vestal, VCBI clearly encompasses more than 80% of Vestal within its 70 dBu contour.

9. Murray submits with its Opposition an amended contour map showing the boundaries of Vestal as depicted using the larger limits of the town of Vestal and arguing that well over 80% of Vestal is incorporated within its principal community contour even using the larger boundaries. While Murray does not directly address or refute Bulmer's tenderability defect argument, we find Murray's application acceptable for the same reason VCBI's application is acceptable--that there is a legitimate claim that the community to be served is the smaller community of Vestal which was clearly shown on both Murray's and VCBI's applications.

10. On August 10, 1987, Bulmer filed a timely Reply to Oppositions to Petition to Return or Dismiss Applications. In its Reply, Bulmer argues first that the *Report and Order* allocating Channel 277A specifies the town of Vestal as the proper community to be served and thus VCBI and Murray filed untenderable applications by showing only the smaller community of Vestal on their contour maps. Bulmer attaches a copy of the Petition for Rule Making filed by Mitchell on October 28, 1985 to assign Channel 277A to Vestal to substantiate its claim. While it is true that the Petition for Rule Making does mention the town of Vestal as the community to be served, the actual adoption of the amendment to § 73.202(b) of the Commission's Rules to include Vestal, New York, does not. *See Report and Order* in MM Docket No. 86-130, released on February 5, 1987. The Petition for Rule Making does not serve as official or final Commission action. What is adopted in the following *Report and Order* does. In this case, the *Report and Order* makes no mention of the "town of Vestal," thus not making it absolutely clear whether the proper community is the town of Vestal or the community of Vestal. Therefore, VCBI and Murray cannot be returned for failing to delineate the boundaries of the town of Vestal, as opposed to the community of Vestal, on their contour maps. Accordingly, Bulmer's Petitions will be denied.

11. *VCBI*. In response to Item 6(a) of Section II of FCC Form 301, VCBI stated in Exhibit B that Mr. Henry A. Strong, a 50% principal of VCBI, is the Vice President and General Manager of WENE, Inc. WENE, Inc. is the licensee of Stations WENE-AM and WMRV-FM, Endicott, New York. Mr. Steven H. Resnick, who is also a 50% principal of VCBI, is the Program Director of Stations WENE and WMRV. Both have stated that they will divest themselves of all interests in these stations should their application be granted. Their divestiture commitment is reflected in an appropriate ordering clause.

12. *KRB*. In response to Item 6(a) of Section II of FCC Form 301, KRB stated in Exhibit 2 that Mr. George Rossi, a 24% General Partner of KRB, is the General Manager of WAAL-FM and WRSG-AM, Binghamton, New York and that Mr. Gerald J. Blasi is the local legal counsel of WAAL and WRSG. Both have stated that they will divest themselves of their roles in WAAL and WRSG should their application be granted. An appropriate ordering clause will be added reflecting their commitments to divest.

13. *Other Matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
VCBI	September 8, 1987
Murray	February 26, 1988
Wiltshire	September 16, 1987

14. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural service in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any of the issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That Angelo's February 12, 1988, Motion to Dismiss its Application IS HEREBY GRANTED.

18. IT IS FURTHER ORDERED, That Bulmer's March 17, 1988, Motion to Dismiss its Application IS HEREBY GRANTED.

19. IT IS FURTHER ORDERED, That all applicants verify their site elevations and coordinates and amend accordingly with the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by Brimark, VCBI, Mitchell, Wiltshire, Morgan, Sherlock-Hart and KRB ARE DISMISSED AS MOOT.

21. IT IS FURTHER ORDERED, That the Petition to Return or Dismiss Applicant filed by Bulmer against Angelo IS HEREBY DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That the Petitions to Return or Dismiss Applicants filed by Bulmer against VCBI and Murray ARE HEREBY DENIED.

23. IT IS FURTHER ORDERED, That if the application of VCBI is granted, prior to commencing program test authority Steven H. Resnick and Henry A. Strong must divest themselves of any and all interest in and connection with Stations WENE-AM and WMRV-FM, Endicott, New York.

24. IT IS FURTHER ORDERED, That if the application of KRB is granted, prior to commencing program test authority Mr. George Rossi and Mr. Gerald J. Blasi must divest themselves of any and all interest in and connection with Station WAAL-FM, Binghamton, New York.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by VCB, Murray and Wiltshire ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 2, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to prevent evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

LNJ COMMUNICATIONS *et al.* File No. BPH-851219MD

For Construction Permit for
a New FM Station on Channel
225A (92.9 MHz)
Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1988; Released: May 13, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Review Board has before it two appeals filed by Shawn Phalen from evidentiary rulings by Administrative Law Judge Walter C. Miller that she make certain documents available for inspection by the competing parties in this proceedings. *Memorandum Opinion and Order*, FCC 88M-690 and FCC 88M- 691, released March 11, 1988. The documents purportedly relate to issues seeking to determine whether Miss Phalen's father, a Commission licensee who over the last twenty years has owned eight radio stations, is the real party in interest to the Montecito application, and/or whether she deliberately concealed her father's recent acquisition of another broadcast station in Longmont, Colorado. Miss Phalen claims in her appeal that certain of the requested documents are protected by the attorney-client privilege existing between Miss Phalen and her father and their common attorney, David Tillotson.

2. In order to facilitate our review of the merits of these appeals, we will direct Phalen to submit copies of the disputed documents to the Board for examination *in camera*. *See Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987); *Opal Chadwell*, 103 FCC 2d 840 (Rev. Bd. 1986). The documents for which a claim of attorney work product or attorney-client privilege are made should be identified, and the basis for the claim of privilege for each document should be specified with particularity and sufficient precision to permit the Board to evaluate the merits of the claim.

3. ACCORDINGLY, IT IS ORDERED, That Shawn Phalen IS DIRECTED to submit within ten (10) days of the release date of this Order copies of the documents referred to in paragraph 2 to the Review Board for *in camera* inspection.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 78-309

In the Matter of

Amendment of §73.658(i)
of the Commission's Rules,
Concerning Network Representation of TV Stations
in National Spot Sales

Request of Spanish International Network (SIN)
for Waiver of §73.658(i)

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: March 24, 1988; Released: May 12, 1988

By the Commission: Commissioner Quello issuing a separate statement.

I. INTRODUCTION

1. This proceeding was commenced in 1978[1] to explore possible changes in the Commission's television "network representation rule."[2] This rule prohibits television stations, other than those "owned and operated" by a television network, from being represented by their network in the non-network (spot) sales market.[3] Although we have not yet reached a final policy decision as to whether changes in the rule are needed, recent developments including, in particular, developments relating to the applicability of this rule in the context of Spanish-language television network operations, make it particularly important that the matters at issue herein now be resolved as promptly as possible.

2. In commencing this proceeding, the Commission granted a "temporary" waiver of the network representation rule to affiliates of the Spanish International Network pending resolution of this proceeding.[4] This waiver remains in force and other similar waivers recently have been granted. During the ten years that have passed since this proceeding was first initiated, the rule and the Univision waiver have been analyzed by the Commission's staff and addressed in adjudicatory proceedings. Yet, subsequent to 1978, the effect of the network representation rule and the Univision waiver have not been subject to general comment in the context of this proceeding. In addition, the growth and development of the electronic media that have taken place since 1978 appear to make obsolete some of the proposals raised in the *Notice*. Thus, the record here is not current. Now before us, related to the situation that has been created by these waivers, are three petitions requesting that the Commission resolve this proceeding. We believe it is appropriate, therefore, to reopen the record in this proceeding to obtain general comment on these developments and to consider additional options regarding the network representation rule, so that this matter may finally be completed.

II. BACKGROUND OF THE RULE

3. The network representation rule, adopted in 1959, is one of a group of television "network" rules that was intended to limit the power and influence of a network over its affiliate stations by proscribing certain commercial practices in the network-affiliate relationship.[5] The intent of these restrictions was to make the decisions of affiliates more independent of the networks. In this way, the Commission hoped to enhance programming service to the public and to promote competition within the broadcast television industry. The Commission's concern with television networks' representation of their affiliates in the spot market dates from 1955, when it initiated a broad examination into television network practices.[6] The *Barrow Report*,[7] issued at the conclusion of this inquiry, contained a study of the representation of television stations in national spot sales by companies which also operate television networks. This report found that national spot and network television competed with each other for advertising business;[8] that there was a potential for, if not actual, conflict of interest when the same party engaged in both activities; that there was evidence that competition had been restrained in certain respects; and that the networks, by virtue of their spot representation activities, had the power to restrain competition in other ways. The report concluded that the public interest would be better served if organizations which operated television networks did not also participate in the representation of television stations in the national spot market.[9]

4. After a rule making proceeding that proposed to implement this recommendation of the *Barrow Report*, the Commission promulgated the television network representation rule.[10] Specifically, Section 73.658(i) provides that:

> No license shall be granted to a television broadcast station which is represented for the sale of non-network time by a network organization or by an organization directly or indirectly controlled by or under common control with a network organization, if the station has any contract, arrangement, or understanding, express or implied, which provides for the affiliation of the station with such network organization; provided, however, that this rule shall not be applicable to stations licensed to a network organization or to subsidiary of a network organization.[11]

The definition of a network organization, for purposes of this rule, is any organization that provides an identical program to be broadcast simultaneously by two or more interconnected stations.[12]

5. The decision to bar broadcast television networks from serving as national representatives of their television station affiliates stemmed from the Commission's determination that network involvement would inhibit competition in the national advertising market and interfere "with the licensee's independent duty to operate his station in the public interest."[13] Specifically, the Commission was concerned that if a network were permitted to repre-

sent its affiliates in the spot market it might limit competition in the sales representation business. The Commission indicated that the network might be able to use its ability to refuse or terminate a network affiliation to coerce an affiliate to use its representative service even though the affiliate may have preferred an independent representative. Furthermore, it believed that a network would be able to restrain competition in the national advertising market by manipulating station spot advertising rates to make the purchase of network advertising time more attractive. Finally, the Commission was concerned that a network would be better able to influence an affiliate's program choices.

6. The Commission adopted the network representation rule based primarily upon the potential power and ability of the television networks to restrain competition rather than upon actual evidence of abuse. Both CBS and NBC actively participated in the station representation business prior to Commission adoption of the network representation rule. They and other parties participated in public hearings before the Commission and submitted evidence into the record of this proceeding regarding their "station rep" activities. After studying the recommendations of the *Barrow Report*, and reviewing the evidence submitted at public hearing and in the record, the Commission concluded that no evidence had been presented indicating that the networks influenced or sought to influence affiliated stations in their choice of spot sales representatives or that networks took spot sales representation into account in making decisions with respect to affiliation.[14] With regard to program content, the Commission stated that the comments filed in the proceeding supported the conclusions of the *Barrow Report* that there was no evidence that the network spot-sales organizations acted differently from the independent station representatives in these or other programming situations. In general, the Commission found that station representatives did not usually become involved in the programming decisions of the stations they represented. In particular, it noted that while they may occasionally give programming advice, particularly if requested by the station, in some instances the network spot-sales organizations had advised against carrying a network program and in favor of a national spot program.[15] The Commission, therefore, indicated that it could not conclude that up until that time networks spot-sales organizations had attempted to unduly influence an affiliate when giving programming advice.[16]

7. The Commission also analyzed whether network representation of affiliated stations in national spot sales affected the degree of competition between network and national spot advertising. The Commission observed that the evidence in the record of the practices of CBS and NBC as station representatives demonstrated instances of cooperation rather than full competition between the network spot sales organizations and their network organizations.[17] In considering this evidence, the Commission stated that networks, as competitors with their affiliated stations for the sale of national television advertising, had an interest in reducing that competition by removing any disparity between network rates and national spot rates. It also observed that the networks' spot sales organizations, by virtue of their representation of affiliated stations, were in a position to support the network in pursuing this goal. The Commission noted that any influence by the network spot sales organizations over the national spot rates of affiliates would interfere with the duty of the station licensees to determine their national spot rates independently, in violation of Section 73.658(h) of the rules.[18] The Commission concluded, on the basis of the evidence before it, that "the performance of these two competitive functions by a single organization cannot be regarded as having no effect on the manner in which the spot representation function is performed."[19]

III. BACKGROUND OF THE PROCEEDING

8. The Commission initiated the instant proceeding in 1978, in response to a request from Univision that it be granted a five-year waiver of the network representation rule.[20] This waiver was to permit Univision to continue to act as the representative of its affiliates in national spot advertising sales. Univision began operations as a national spot advertising representative, expanding later into the syndication of Spanish-language programming.[21] As a syndicator, Univision had not been subject to Section 73.658(i). When Univision began distributing its programming on an interconnected basis, it became a broadcast "network" within the meaning of the network representation rule. Univision requested a waiver from the rule so as to retain its "rep" business. In support of its waiver request, Univision argued that the rule was adopted as a restriction on stations affiliated with the three national networks--ABC, CBS and NBC--and was not really intended to, and should not, apply to stations affiliated with other network entities, such as itself. Univision urged the Commission to expressly limit the rule to traditional networks, *i. e.*, those that offer an interconnected program service for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states.[22]

9. The Commission responded to Univision's request for waiver by issuing the *Notice* in this proceeding. The primary issue raised in the *Notice* was whether it was appropriate to continue to include emerging networks, such as Univision, within the scope of the network representation rule. The Commission stated that while the rule was adopted with the major national networks primarily in mind, it was not in a position to say that application of the rule was not also warranted in the case of Univision and other new networks.[23] The *Notice* sought comment, therefore, on whether the Commission's concerns with respect to network anticompetitive behavior in this area were applicable to emerging as well as traditional networks. Without indicating an opinion on the merits of Univision's request, the Commission decided that the public interest would be served by maintaining the *status quo* for a one-year period. Thus, it granted a temporary waiver of the network representation rule to permit Univision to continue to act as its affiliates' advertising representative in non-network sales.[24] This temporary waiver was to remain in effect until October 1, 1979, or 60 days after a final decision in the proceeding, whichever was later. The Commission stated that during this time, comment would be sought on some of the questions raised by the Univision request. In this regard, the *Notice* sought comment on whether the rule should be limited in its applicability to the major television networks by incorporating the definition of "network" contained in Section 73.658(j) of the rules; whether stations having a significant degree of common ownership with the network should be exempted from the rule's scope; and whether the rule should be applied to stations provided with substantial amounts of programming on a regular basis by the network even

though they do not receive it by wire or radio interconnection. The instant proceeding has remained open since that time.[25]

IV. INTERVENING EVENTS

10. *The Network Inquiry*. In 1977, the Commission instituted its third general inquiry into the commercial practices of the television networks.[26] The Commission noted that, in light of the passage of time since the previous network inquiry, it was appropriate to review the effect of its rules on network conduct and whether more or less regulation was warranted. The Commission created a "Special Staff" to conduct this inquiry. As part of its mandate, the Special Staff reviewed the effect of the network representation rule in promoting the Commission's goals of competition, localism and diversity. The Special Staff concluded, after several years of extensive study, that, in general, attempts to rectify imbalances in bargaining power between networks and affiliates by regulating network contract terms are inherently unlikely to succeed. Because contractual restrictions prohibit certain business practices without altering the number or identity of the firms, or the structure of the market within which they operate, such regulation leaves unaffected, the Special Staff asserted, the bargaining power that gave rise to the concern. Thus, the firms may be able to frustrate the regulation's compensatory purpose by altering other terms of the agreement to their advantage.[27] The Special Staff recommended that the Commission, rather than deal with network dominance through a search for effective regulation, try to deal with the source of that dominance by reducing or eliminating regulatory barriers to the entry of new networks.[28]

11. With respect to the network representation rule in particular, the Special Staff stated that it "can be viewed as designed to reduce the possibility of collusion in the setting of national advertising rates by prohibiting networks from controlling or influencing directly the rates of the closest substitutes for network advertising, national spot sales."[29] The Special Staff observed, however, that there is little likelihood that the three major networks could successfully engage in such anticompetitive behavior. The Special Staff concluded that the three networks compete with each other in the network advertising market, and if "networks would find it difficult to collude effectively on network advertising rates, it necessarily follows that successful collusion with respect to both network and national spot rates is even more implausible."[30] Thus, they concluded that networks would be unable to use their position as advertising representative of their affiliates to manipulate station spot advertising rates to make the purchase of network advertising more attractive.

12. The Special Staff also argued that the network representation rule may prevent the realization of economic efficiencies. The Special Staff reasoned that because networks sell advertising time to national advertisers, they have established contacts with most advertisers who participate in the national spot market and thus may be able to represent their affiliates in the national spot market at lower costs than those of independent station representative firms. These cost savings could lower the price of advertising time, thereby promoting the public interest.[31] Finally, the Special Staff pointed out that the breadth of the rule biases program distributors' decisions against broadcast networking. Because the rule applies to program distributors affiliated with two or more electronically-interconnected broadcast outlets, distributors that do not employ simultaneous interconnection or that affiliate only with cable or MDS systems escape the reach of the rule.[32]

13. The Special Staff concluded that the network representation rule should be repealed.[33] It also recommended that the Commission consider, at a minimum, exempting emerging networks from the rule. The Special Staff noted that imposing the rule on such new, emerging networks may deprive them of revenues they could otherwise obtain as the advertising representative of their affiliates, thus reducing their anticipated profitability, and possibly limiting the number of new networks which arise. The Special Staff concluded that there appeared to be no public interest benefit from imposing the rule on emerging networks, noting that when a fledgling network competes in the same advertising market as the traditional networks, it would be unlikely to have a significant impact on the advertising market if the new network were the spot advertising representative of its affiliates.[34]

14. *The SIN/SICC Proceeding*. In 1983, the Commission designated for hearing the renewal applications of Spanish International Communications Corporation (SICC), Bahia de San Francisco Television Co. (Bahia), and Seven Hills Television Co (Seven Hills).[35] The six television broadcast stations licensed to SICC and Bahia[36] were included in the nine stations that were granted a waiver of the network representation rule in 1978.[37] The major issue designated in this proceeding was whether SICC, Bahia or Seven Hills, was controlled by aliens in violation of Section 310(b) of the Communications Act of 1934, as amended. The Commission also designated for hearing the issue of whether the public interest, convenience and necessity would be served by continuing the waiver of Section 73.658(i) granted SICC and Bahia in 1978 in the *Notice* in the instant proceeding. Administrative Law Judge John H. Conlin issued his decision in the hearing case on January 8, 1986. Judge Conlin determined that the licensees were in violation of the alien ownership provisions of the Communications Act and that the licenses of the stations involved should not be renewed.[38] With respect to the waiver issue, Judge Conlin noted Univision's growth as a network and the position of dominance it had achieved with Spanish-language programming stations over the years since the waiver was granted and questioned whether the Commission should assist in the perpetuation of this dominance by continuing to exempt Univision from a rule that has applied to other television networks.[39] Judge Conlin concluded that the waiver acted as an impediment to the establishment of competing national spot sales representatives.[40] Elimination of the waiver for these stations, the judge stated, would likely foster the development of additional national advertising representatives. He noted that the increase in competition would lead to reduced commission rates, lower advertising rates and a lessening of the licensees' dependence on Univision, thus ultimately serving the public interest.[41] On this basis, Judge Conlin concluded that continuation of the waiver with respect to these stations was not in the public interest.[42]

15. Subsequent to the issuance of Judge Conlin's decision, the Station Representatives Association (SRA) and Caballero Spanish Media, Inc. (Caballero) submitted petitions requesting that the Commission terminate the waiver granted to Univision.[43] Petitioners state that Univision's waiver should be terminated because it was granted on a

temporary basis, had now been in effect for almost a decade, and no longer serves the public interest as determined by Judge Conlin in the SIN/SICC case, as it applies to six of Univision's affiliates. Univision filed in opposition, asserting that it would violate Section 7(b) of the Administrative Procedure Act to terminate its waiver on the basis of the ALJ's decision in the SIN/SICC adjudicatory proceeding.[44] In addition, Univision argues that the record in the instant proceeding should be updated in light of the the issuance of the *Network Inquiry Final Report* and the Commission's new regulatory emphasis on elimination of non-cost-effective rules and policies.[45]

16. On June 1, 1987, the Commission approved a settlement agreement between SICC, Bahia and the Mass Media Bureau wherein the stations licensed to SICC and Bahia were to be transferred to a new licensee and the Section 73.658(i) waiver granted to the SICC/Bahia stations would terminate upon completion of the license transfers.[46] The Commission stated that in approving the settlement agreement it removed the waiver issue from the adjudicatory proceeding and, thus, no further impediment existed to prompt consideration by the Mass Media Bureau of the issues raised in the instant proceeding.[47] The Commission further ordered that the petitions filed by SRA and Caballero, discussed above, be referred to the Bureau for disposition.[48]

17. On July 9, 1987, Univision submitted a *Motion to Reopen Record for Limited Supplemental Comments and Expedited Decision* in the instant proceeding.[49] Univision requests that the Commission reopen the record to allow the filing of limited supplemental comments to update the eight year old record. It reiterates its position that the Commission should carefully consider the analyses and conclusions of the *Network Inquiry Final Report* in the context of any reevaluation of the scope of the network representation rule. Univision notes, further, that since 1978 the Commission has recognized that the marketplace may be a better and less costly regulator than governmental rules and that the Commission has deleted prohibitions concerned with a number of broadcast business practices that, like the network representation rule, were designed to promote competition by forbidding activities not otherwise illegal under state or federal antitrust laws.[50] Univision also requests that the Commission resolve the rule making expeditiously, before it is required to relinquish the spot sale waiver for six of its affiliates as part of the settlement agreement. Univision states that once it loses the waiver for the major market stations, pursuant to the agreement, it will not be economical to continue to provide national spot sale representation to its other affiliates which are not subject to the adjudicatory settlement.[51] Univision asserts that the result is a complete and unnecessary disruption of the Spanish television industry, since the rule might be ultimately eliminated after further evaluation by the Commission.

18. On October 28, 1987, the Review Board adopted a *Decision*, reviewing Judge Conlin's Initial Decision in the the SIN/SICC proceeding as it applies to the Seven Hills Television Company.[52] The Review Board determined that Seven Hills was not in violation of Section 310(b) of the Communications Act of 1934, as amended. The Review Board renewed Seven Hills' license, subject to certain conditions. Two conditions are of particular relevance to this proceeding. First, the Review Board ordered Seven Hills to cease sharing local advertising revenues with Univision. Second, the Review Board ordered Seven Hills to cease operating on its "assumed" waiver of the network representation rule.[53]

19. *Additional Waivers of the Network Representation Rule*. On April 22, 1986, the Latin International Network Corporation (Latinet) filed a petition for waiver of the network representation rule to allow it to provide both Spanish-language programming and national spot sale representation to its affiliates. Latinet stated that the waiver was warranted because the Commission intended the network representation rule to apply only to the three major television networks; that the waiver would foster, not impede, competition in Spanish language television programs and in the national spot sales market; and that the public interest in developing competing networks, fostering program diversity and encouraging minority programming and participation in broadcasting outweighed the theoretical concerns underlying the rule. On March 13, 1987, Telemundo Group, Inc. filed a petition for temporary waiver of the rule so that it, too, could provide both Spanish-language programming and national spot sale representation to its affiliates. Telemundo stated that it needed the waiver to be able to compete on a more equal basis with Univision. On March 26, 1987, the Mass Media Bureau granted temporary waivers of the rule to both Latinet and Telemundo. In granting the requests for waiver, it was noted that development of competing Spanish-language program suppliers may be impeded so long as only Univision had the waiver. The Bureau indicated that these temporary waivers would be "in effect until such time as the waiver of this rule which authorized Univision to serve as a national representative expires, as may be provided in any future Commission action."[54]

V. DISCUSSION

20. A considerable period of time has elapsed since the Commission opened this proceeding. The comment period closed prior to the completion of more recent analyses of the viability of the basis for the network representation rule. In this regard, the conclusions and recommendations of the *Network Inquiry Final Report*, and pertinent implications of the decision in the SIN/SICC proceeding, have not been subject to general comment in the context of the issues raised in the *Notice*. Furthermore, the permanent status of the outstanding "temporary" waivers, which now involve three broadcast network organizations (Univision, Telemundo and Latinet), cannot be resolved absent completion of the instant proceeding. Finally, the Commission has not comprehensively reviewed the network representation rule since it was promulgated in 1959. Our professed goal of protecting licensees from the exercise of anticompetitive network practices was established during a period when the distribution of new, nonlocal television programming was provided almost exclusively by the major broadcast television networks and their affiliated stations. There have been significant changes in the regulatory and competitive environment of broadcasting in the twenty nine years the network representation rule has been in effect. A thorough review of this rule, therefore, appears to be warranted.

21. Our review of the network representation rule will consider the full range of policy options. In this regard, we intend to consider three basic proposals. The first is to modify the rule so that emerging networks are explicitly exempted from the scope of the network representation

rule. In this respect, we solicit comment with respect to whether the rule should be applied only to the traditional, national broadcast television networks and the appropriate manner in which such networks may be defined. The second option is to eliminate the network representation rule in its entirety. In this regard, we solicit comment on whether any broadcast television network can, in today's media environment, adversely affect competition in the television advertising market to such an extent as to warrant the continued imposition of the network representation rule. The third is to retain the network representation rule in its present form. We solicit comment with respect to an appropriate waiver policy if we were to retain the rule. We discuss each of these possible courses of action, in turn, below.

A. *An Exception to the Rule for Emerging Broadcast Networks*

22. The proper scope of the television network representation rule did not appear to be a difficult issue when the rule was first adopted in 1959, as there were only three television networks of any consequence in existence at the time. The expense of terrestrial interconnection, the only method of simultaneous program distribution available at that time, was a formidable barrier to the creation of new networks. The other program distributors, *i. e.*, the syndicators, who delivered programs by mail or express on a non-interconnected basis, clearly functioned as secondary players in the program distribution market. Thus, limiting regulation to the "networks," a term synonymous with "large and powerful program distributors" seemed appropriate at that time.

23. The development of domestic satellite service for simultaneous program distribution, a frequently more efficient alternative to terrestrial interconnection, largely eliminated this barrier to networking. Program distributors who were previously limited to hard copy delivery methods could, now, also deliver their programs on a "network" basis to broadcast television stations as well as to alternative media outlets, such as cable systems. As satellite networking has increased, the network representation rule appears to have had the unintended effect of penalizing emerging networks for using the more efficient technology. In this regard, we note that the Network Inquiry Special Staff recommended that the Commission exempt emerging networks from the rule in order to foster their growth and development. The Special Staff concluded that there appeared to be no public interest benefit from imposing the rule on emerging networks. It found that when a fledgling network competes in the same advertising market as the traditional networks, it would be unlikely to have a significant impact on the advertising market even if the new network were the spot advertising representative of its affiliates. We seek comment on the Special Staff's analysis and recommendations.

24. We further note that Judge Conlin recommended that the waiver of the network representation rule the Commission granted to six affiliates of Univision be rescinded in order to foster competition in national spot sales representation. He based his recommendation to a large extent on the premise that Univision's growth and development was fostered by the waiver which gave it an unfair advantage over other market participants because a similar waiver was not available to them. We note that since the release of Judge Conlin's decision, the Mass Media Bureau, on delegated authority, has granted waivers of the network representation rule to two additional Spanish-language program networks. Early indications are that the presence of a second Hispanic television network has expanded the overall advertising market. Telemundo, which only began operating as a network in January, 1987, is already an aggressive competitor in the delivery of Spanish-language programming.[55] Hispanic television advertising revenues more than doubled between 1982 and 1986 (to $184 million) and the expectation of industry participants is that the presence of Telemundo will expand the overall advertising market even further.[56] It seems that granting the waiver to Telemundo has encouraged new entry into "networking" and has enhanced rather than discouraged competition in the delivery of television service to the public. In this regard, an exemption to the network representation rule for emerging networks, so that others could similarly participate, would seem to increase the prospects for more competition. We seek comment on the above.

25. While one could argue that in the absence of the network representation rule, specialized networks might have some potential market power over advertising or their affiliated stations, we believe that such power would be quite limited. First, affiliated stations are likely to be able to find sources of programming and advertising other than that provided by the particular network. For example, we noted, above, the rapid growth of Telemundo is due, in large measure, to the fact that it was granted a waiver of the network representation rule. We suspect that other similar specialized networks would also develop if they were unencumbered by this rule. Second, if there is sufficient consumer demand for special programming (for example, Spanish language programming) we would anticipate that additional stations would develop in large metropolitan areas to serve those consumer desires. The development of such stations would then make it even easier for additional networks to develop, which should, in turn, place further constraints on the possible market power of any particular network.

26. However, even if we were to determine that it may logically be possible for an emerging network to exercise a measure of influence over other aspects of the business of its affiliates, we believe it may still be desirable to permit them to be the national spot advertising representative of their affiliates, in order to encourage their growth and development to the benefit of consumers. We seek comment on whether application of the rule to emerging networks creates inefficiencies and may hinder their development. We further seek comment on whether any such harm would justify excluding emerging networks from the network representation rule, despite the possible potential for emerging networks to exercise control over their affiliates.

27. *Definition of a Network.* In the 1978 *Notice*, when the Commission first considered limiting the scope of the network representation rule, it proposed applying the "15 hours-25 affiliates-10 states" definition of network in Section 76.658(j)(4) so that the rule would apply only to the major national television networks. This standard has since been criticized for including more than the major networks, and we, therefore, intend to consider other possible alternatives for modifying the definition of a network as it applies to Section 73.658(i). Before addressing these alternatives, it is helpful to review the specific concerns with the existing standard. As mentioned above, the Commission first modified the definition of a broadcast

television network, for purposes of applying a "network rule," when it adopted the financial interest and syndication rule and prime time access rule.[57] Originally undefined in the decision adopting these rules, the term "network" was explicitly defined on reconsideration to apply only to major national broadcast television networks.[58] In this regard the Commission stated that:

> Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission. Hence we have redefined the term "network" . . . to apply only to major national television networks. This will remove any doubt that our actions are intended to encourage the competitive development of additional networks as well as other alternate program sources.[59]

This new definition of a broadcast television network, the "15-25-10" standard, was adopted by the Commission without discussion, and, thus, the bases of the definition's parameters are unclear.

28. In 1980, the Christian Broadcast Network (CBN) requested waiver of the financial interest and syndication rules. CBN argued that the "15-25-10" standard was no longer adequate to distinguish traditional national networks from other program distributors because the development of the domestic satellite service permitted any programmer to easily reach all the states in the continental United States. The Commission agreed with CBN and granted the request for waiver. It stated that in light of the ease of adding affiliate stations through satellite links, the numbers of states and affiliates did not appear to provide a meaningful standard for defining a network for purposes of Section 73.658(j).[60] The Commission also observed that station coverage may no longer be an accurate measure of a network's financial resources and market power.[61] The Commission concluded that granting CBN a waiver of Section 73.658(j) by permitting it to offer up to 30 hours per week of network programming would give it ample opportunity to develop and expand its endeavors, while also ensuring that the Commission's basic regulatory aims were preserved.[62]

29. In 1983, the Commission considered modifying the "15-25-10" definition of network contained in Section 73.658(j) as part of the *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345, stating that while the rule was intended to cover the three major networks, the actual language of the rule was more inclusive.[63] The Commission proposed, therefore, to expressly limit the application of the financial interest and syndication rules to those entities over which there were legitimate concerns, the three major national networks.[64] This proposal is still pending.

30. In view of the above, if the representation rule is modified so as to exempt emerging networks, it may not be desirable to define standards for applying the rule in terms of the number of affiliates or the number of states served. If we were to modify this rule in a way that would include only traditional networks, it would appear reasonable to define traditional networks so as to focus only on the major television networks that have affiliates with nationwide circulation, a category that at this time includes only ABC, CBS, and NBC. Those three networks are by far the largest at this time, whether size is measured by potential audience, actual viewing audience, advertising revenues or expenditures. However, if we do modify this rule to include only traditional networks, we would like to define the rule in such a way that it would take into account growth or decline over time in the relative size of different networks. Thus, we solicit comment and proposals regarding alternative standards for triggering the application of the network representation rule. For example, we could define networks to be covered by this rule using some measure of the size of the network such as average total audience or average evening viewing audience or annual advertising revenues. We request comment on these and other possible criteria on the appropriate thresholds thereunder.

B. *Elimination of the Rule*

31. *Economic Competition Factors.* Our examination of the video services market indicates that competition appears to have increased to such an extent since the network representation rule was adopted that the underlying competitive premise of the rule itself needs to be reexamined. In the 1950's, networks and their affiliates were the predominant suppliers of television advertising time for national advertisers. Based on this, the Commission determined that each network had both the incentive and ability to influence its affiliates' national spot advertising rates so as to increase its own profits from network advertising. In the years since the rule was adopted, however, there has been substantial growth in the television broadcast service. For example, the number of television broadcast signals receivable per market has increased greatly. Almost 70 percent of the nation's television households now receive nine or more television signals off-the-air, whereas only 8 percent could do so in 1964.[65] Growth in the number of independent broadcast stations[66] has accounted for most of this growth. The number of such stations increased from 90 in 1970 to 270 in 1986, an increase of 300 percent.[67] Furthermore, growth in commercial television outlets available has not been limited to expansion of over-the-air facilities. In particular, cable television services have grown significantly. In 1959, there were 560 operating cable systems with 550,000 subscribers. In 1987, there were 7,900 systems with almost 40 million subscribers.[68] The growth of the cable industry has also been accompanied by the emergence of new cable-based television program providers or "cable networks," many of which sell commercial time to national advertisers. Currently, there are approximately 58 cable networks in operation.[69]

32. In light of the expansion in the number of advertiser-supported television service outlets, both broadcast and cable, any attempt by a network to raise the national spot rates of its affiliates to encourage the purchase of network time could be expected simply to cause advertisers to shift their purchases of commercial time to independent stations and advertiser-supported cable networks which comprise a significantly larger number of alternative outlets than existed when the rule was promulgated in 1959.[70] Thus, a broadcast television network may no longer have the ability to reduce competition in today's expanded and increasingly diverse advertising market.

33. Furthermore, competition among the networks themselves may prevent any of them from significantly influencing national advertising rates. Any attempt by a single network to reduce the supply of its affiliates' spot advertising time in order to raise the price of network advertising, is likely to induce the other networks or their

affiliates to respond in various ways that will frustrate the attempt by one network to reduce the supply of its affiliates' spot advertising time. For example, the other networks or their affiliates may increase their advertising time to compensate. Thus, an additional reason exists as to why a broadcast television network may not have the ability to reduce competition in the advertising market.

34. It also appears that the incentive of a broadcast television network to manipulate spot advertising rates may be low. The Commission concluded, in its recent assessment of competition in the network and spot advertising markets undertaken in the "Rule of Sevens" proceeding, that spot and network advertising time are not close market substitutes.[71] If the purchasers of television advertising time do not consider spot and network advertisements to be good substitutes for one another, then a television network would have little incentive to attempt to influence its affiliates' spot advertising rates since it would have little impact on its own profits from the sale of network advertisements.[72] This lack of incentive would appear to be further exacerbated by the increased competition in the video marketplace as discussed above. We seek comment on all of the above matters as they relate to the competitive assumptions underlying the network representation rule.

35. In addition to the above, the Commission also has recently reevaluated its assessment of the degree of influence it believes a station representative can exert over its clients. The *Golden West Policy*, which was first articulated in 1969, prohibited national or regional sales advertising representatives from owning one broadcast station and representing a competing station in the same service in the same market.[73] This policy was based on the assumption that an advertising sales representative could have sufficient influence on the operation of the stations it represented to limit diversity of views and economic competition, which is one of the same assumptions underlying the network representation rule. The Commission abolished the *Golden West Policy* in 1981.[74] In reviewing the business practices of advertising representatives, the Commission found that programming advice was not forced upon a client station and that the potential for impairment of economic competition was mitigated by the incentive of the unaffiliated station to seek the sales representative that will most vigorously serve its interests. Thus, the Commission concluded that there was no indication that competition, diversity or licensee independence would be harmed if a sales representative were affiliated with a direct competitor. The Commission further stated that should anticompetitive activities arise, federal and state antitrust laws and private suits were sufficient to deter them. We seek comment on the relevance of the Commission's analysis in the *Golden West Policy* that a station advertising representative has only a limited ability to influence the behavior of the stations it represents to whether a network serving as advertising representative could influence the spot rates of its affiliates.

36. *Cost/Benefit Analysis*. The Network Inquiry Special Staff also argued, as discussed above, that there is little likelihood that the major networks could successfully engage in the anticompetitive behavior precluded by the network representation rule. The Special Staff argued, further, that the rule imposes efficiency losses (*i. e.*, costs) on the delivery of programming service to the public in that networks may be able to represent their affiliates in the national spot market at lower costs than those of independent station representative firms. These cost savings could lower the price of advertising time, thereby promoting the public interest. Finally, the Special Staff pointed out that the scope of the rule biases program distributors' decisions against broadcast networking, which is an efficient method of program delivery. This is so because the rule applies only to those broadcast networks distributing programming to television stations on a simultaneous-interconnecton basis. Program distributors who "syndicate" or who affiliate only with cable or MDS systems are not included within the scope of the rule. Thus, program delivery costs may be higher because of the network representation rule. We request comment on the Special Staff's analysis.

37. The Commission has recently acted to reevaluate the costs and benefits of its regulatory role in the commercial business practices of licensees in other areas. In the "Underbrush" proceeding, the Commission reviewed several of its rules and policies which attempted to regulate business practices between buyers and sellers in the advertising market.[75] These rules and policies were reviewed in the context of whether it was appropriate for the Commission to continue to expend its limited resources enforcing specific rules of business conduct which are not prohibited by the antitrust laws, in an area where adequate remedies are available elsewhere, and no communications policy objectives were otherwise promoted. After evaluating these costs and benefits, the Commission concluded that the costs to the public which result from the practices in question are not so great as to warrant expenditure of the Commission's limited regulatory resources.[76] We request comment on the applicability of this analysis to our consideration herein of the network representation rule.

C. *Retainingthe Rule with a Waiver Policy*

38. We also may decide, on the basis of the record developed in this proceeding, that no change in the network representation rule is warranted. We seek proposals and comment on the appropriate approach for resolving the outstanding waivers if we were to adopt this course of action. Thus far, we have granted each of the three requests for waiver we have received and it is conceivable that additional requests for waiver will be filed in the future. It would be appropriate at this time to establish a policy with respect to waivers so that the rule not become applicable, *de facto*, to traditional networks only. We seek comment, therefore, on the appropriate criteria to apply in evaluating any future requests for waivers of this rule. Commenters are encouraged also to discuss how these criteria may be applied to resolving the status of the outstanding waivers that are not at issue in the SIN/SICC adjudicatory proceeding.

39. In the *Notice*, the Commission found that the public interest would be served by permitting the waiver of the network representation rule to continue during the pendency of the proceeding. We see no reason to alter that position at this time. In view of the possibility that we may modify or eliminate the rule, it might be unnecessarily disruptive to terminate the existing waivers at this time. Therefore, with one exception relating to the "assumed" waiver for station KTVW,[77] we will continue to permit Univision to serve as both a program network and national sales representative for its affiliated stations. On this basis, we deny the request by SRA and Caballero to terminate the Univision waiver.[78] The temporary waivers

granted to Latinet and Telemundo will likewise continue in their entirety until this proceeding is terminated. We intend to grant no further waivers of this rule during the pendency of this proceeding.

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

40. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* The Commission has before it several petitions that request that we resolve the outstanding proceeding in an expeditious manner. The comments solicited in this *Further Notice of Proposed Rule Making* will enable the Commission to resolve the concerns raised in the *Notice* based on up-to-date information.

II. *Objectives.* The modifications to the network representation rule proposed herein could permit the video services industry to function without restrictions on their business practices that do not promote the public interest.

III. *Legal basis.* Authority for this rule making is contained in Section 4(i) and 303 of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected.* Modifications to the network representation rule may potentially impact the structure of the broadcast television industry. If we were to modify or eliminate the network representation rule, broadcast television networks who are now precluded from representing their affiliates in the national spot market could now do so. We anticipate that changes in the network representation rule may facilitate more efficient business operations. We do not know, however, at this time, the magnitude of these effects. These benefits would depend, in large part, on the extent to which the Commission modified the rule.

V. *Reporting, record keeping and other compliance requirements.* None.

VI. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objectives. The rules proposed herein suggest a number of alternative options for modifying the network representation rule. We have requested that interested parties comment on these alternatives and provide us with other alternatives that they believe are appropriate for resolving the issues raised in this proceeding.

PROCEDURAL MATTERS

41. Written comments are requested on the initial regulatory flexibility analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Further Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 *et seq.*) (1982).

42. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

43. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding, and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

44. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 24, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

45. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens on the public.

46. Accordingly, IT IS PROPOSED That Part 73 of the Commission's rules and regulations BE AMENDED as discussed herein. In addition, IT IS ORDERED that the above mentioned petitions ARE GRANTED to the extent indicated herein and otherwise ARE DENIED, without

prejudice. Finally, notwithstanding the provisions of §73.658(i) of our Rules, Univision MAY CONTINUE TO SERVE as national representative for its affiliated stations for a period extending 60 days after the final decision in this proceeding, except for KTVW, Phoenix, AR.

47. This *Further Notice of Proposed Rule Making* is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

48. For further information concerning this proceeding, contact Judith Herman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

49. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] *Memorandum Opinion and Order and Notice of Proposed Rule Making (Notice)* in BC Docket No. 78-309, 43 FR 45895 (October 4, 1978).

[2] 47 CFR §73.658(i). *See* paragraph 3, *infra*.

[3] *See* note 8, *infra*, for a discussion of the network and spot sales markets.

[4] Spanish International Network first altered its corporate title to "SIN," and now engages in its program distribution and advertising representation business under the name of "Univision, Inc." Hereinafter we refer to this organization as Univision. On February 16, 1988, the LatCom Group, Inc. (LatCom), a subsidiary of Hallmark Cards Incorporated, purchased Univisa, Inc. (Univision is a subsidiary of Univisa, Inc.) from Televisa, S.A. *See* pleading of *The LatCom Group, Inc. Statement in Support of Request for Declaratory Ruling*, filed March 25, 1988.

[5] The regulations concerning television network-affiliate relationships are set forth in Section 73.658 of our rules. 47 CFR §73.658.

[6] The Commission first considered the question of network representation of stations in national spot sales in radio in 1948, in response to a complaint filed by the National Association of Radio Representatives. The Commission determined at that time that no violations of the "chain broadcasting rules" had occurred. Public Notice Report No. 1701 of Broadcast Actions of the FCC, July 1, 1950.

[7] Network Study Staff, *Network Broadcasting*, F.C.C., 1957 (reprinted as H. Rep. No. 1297, 85th Cong. 2d Sess., 1958). Hereinafter cited as " *Barrow Report* ". The *Barrow Report* was the Commission's second broad scale investigation into the commercial practices of the broadcast networks. The first inquiry, begun in 1938, culminated in the *Report on Chain Broadcasting* and *Order* in Docket No. 5060 (1941).

[8] The major forms of television advertising are network, which is sold by the networks and distributed nationally in connection with network television programs, and local or "spot," which is sold on an individual market by market basis by local stations. Spot advertising appears on network programs in the time allotted during such programming for the local affiliates. A third category, national spot, is spot advertising sold to national advertisers. Advertisers, or their advertising agencies, negotiate directly with salespersons from the networks for network advertising, and with local stations for local "spot" advertising. In the national spot market, a third party, the station representative, generally makes the time sales to national or regional advertisers. The need for such an agent derives from the fact that national advertising agencies are situated in a few commercial centers and it is uneconomical for local stations to have their own sales staffs covering national agencies in distant cities. *See generally*, David F. Poltrack, *Television Marketing : Network / Local / Cable*, 1983.

[9] *Barrow Report* at 528-540.

[10] *See Network Representation of Stations in National Spot Sales*, 27 FCC 697 (1959), *recon. denied*, 28 FCC 447 (1960), *affirmed sub. nom. Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961).

[11] The Commission declined to apply the network representation rule to radio networks, concluding that networks do not occupy a dominant position in radio as they do in television. *Network Representation of Stations in National Spot Sales*, *supra*, at 726.

[12] This definition of a network derives from the *Report on Chain Broadcasting*, ch. VII, J. *See* citation in Section 73.658(a) of the rules.

[13] *Network Representation of Stations in National Spot Sales*, 27 FCC 697, 720 (1959).

[14] *Id.* at 709.

[15] *Id.* at 719 *citing* Barrow Report at 538-539.

[16] *Id.* at 720.

[17] The Commission specifically cited evidence concerning CBS contained in the *Barrow Report*. In this regard, during 1952-54, the network undertook a "campaign" to equalize spot and network rates. This campaign consisted of cooperation between the CBS Spot Sales Division and the television network division to raise the spot rates of affiliates represented by CBS Spot Sales; and use of the network's ability to increase network compensation to stations as a lever to obtain the station's agreement to increase its national spot rate. In carrying out this campaign CBS Spot Sales provided information to the network on plans for national spot rate changes by stations represented by the spot sales organization. *Id.* at 717.

[18] *Id.* at 719. Section 73.658(h) of the rules provides that: "No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs." *See* 47 CFR §73.658(h). This rule is one of the original "chain broadcasting" rules, adopted for television licensees in 1945. *See Amendment of Part 3 of the Commission's Rules*, 11 FR 33 (January 1, 1946).

[19] *Network Representation of Stations in National Spot Sales* at 714-715.

[20] *Notice* at paras. 1 and 2.

[21] "Syndication" is a term of art referring to program distribution on a non-interconnected basis, for example, by mail or express delivery carrier. Before domestic communication satellites became available in the late 1970's for simultaneous distribution of television programming, syndication was the predominant alternative to the simultaneous delivery by wireline and microwave network used by the major broadcast television networks.

[22] *See Notice* at para. 8. The Commission adopted this definition of a "network," for purposes of applying the prime time access and financial interest and syndication rules. *See* Section 73.658(j)(4) of the Rules. This definition of network is referred to,

hereinafter, as the "15-25-10" standard. Univision had nine affiliated television licensees when it filed its request for waiver in 1978.

[23] *Notice*, *supra*, at para. 10.

[24] *Id.* at paras. 2 and 18. The nine affiliates granted the waiver were stations KDTV, San Francisco, CA; KFTV, Hanford-Fresno, CA; KLOC (now KCSO), Modesto, CA; KMEX-TV, Los Angeles, CA; KORO, Corpus Christi, TX; KWEX-TV, San Antonio, TX; WCIU, Chicago, ILL; WLTV, Miami, FL; and WXTV, Paterson, NJ.

[25] Univision continues to operate, at this time, under the provisions of this waiver. Moreover, pending agency clarification, Univision has notified the Commission that it is representing other affiliates, in addition to the nine stations given a waiver in the 1978 *Notice*. Stations KTVW, Phoenix, Arizona, KCBA, Salinas, CA, and KNBN, Dallas TX, were specifically identified by Univision as stations operating under an "assumed" waiver since issuance of the 1978 *Notice*.

[26] *Notice of Inquiry* in Docket No. 21049, 62 FCC 2d 548 (1977). This Inquiry culminated in The Final Report by the Network Inquiry Special Staff, *New Television Networks : Entry, Jurisdiction, Ownership and Regulation*, October 1980 (hereinafter cited as *Network Inquiry Final Report)*. No Commission action has been taken with respect to the *Network Inquiry Final Report*.

[27] *Network Inquiry Final Report*, Vol. I, at 23.

[28] *Id.* at 29.

[29] *Id.* at 492. The Special Staff reached its conclusions with respect to the network representation rule based on the analysis in an earlier Network Inquiry report, *The Market for Television Advertising*, Network Inquiry Special Staff, June, 1980.

[30] *Id.* at 492.

[31] *Id.* at 493.

[32] *Id.* at 495.

[33] *Id.* at 497, and *Recommendations of the Network Inquiry*, December 1980, 9.

[34] *Id.* at 499.

[35] *See Memorandum Opinion and Order* in MM Docket No. 83-540 *et. al.*, released June 16, 1983, 48 FR 28549 (1983). The Commission subsequently included Seven Hills Television Company, licensee of KTVW-TV, Phoenix, AR, in this proceeding. *See* MM Docket No. 83-657, released July 12, 1983, 48 FR 33539 (1983). (These consolidated proceedings will be referred to as the SIN/SICC proceeding.) Nothing the Commission does in this *Further Notice* is intended to prejudice any questions raised in the SICC/SIN adjudicatory proceedings.

[36] SICC was the licensee of stations KFTV, KMEX, KWEX, WLTV, and WXTV. Bahia was the licensee of station KDTV.

[37] Station KTVW-TV, Phoenix, AR, licensed to Seven Hills, was not one of the nine stations granted a waiver of the network representation rule in 1978. KTVW has been operating, nevertheless, under an "assumed" waiver. *See* paragraph 8, note 25, *supra*.

[38] *Initial Decision of Administrative Law Judge John H. Conlin* in MM Docket No. 83-540 et. al., released January 8, 1986, at para. 192.

[39] *Id.* at para. 186.

[40] *Id.* at para. 188.

[41] *Id.* at 189-190.

[42] *Id.* at para. 191. Subject to appeal, the effect of this decision was to eliminate the waiver for these six stations previously granted a waiver (*i. e.*, KDTV, KFTV, KMEX, KWEX, WLTV and WXTV). However, the waiver issue with respect to these stations is now moot. *See* note 47, *infra*.

[43] *See Request for Termination of Waiver*, filed February 7, 1986, by SRA; and, *Petition for Termination of Rule Making and Waiver*, filed March 10, 1986, by Caballero. SRA is a trade association. Caballero is a Spanish-language radio sales representative firm representing Spanish-language radio stations.

[44] *See Opposition to Petitions for Termination of Rule Making and Waiver of Section 73. 658 (i)* and *Request for Further Notice of Inquiry*, filed June 4, 1986.

[45] Univision referred specifically to Commission decisions in the *Character Policy Statement*, 59 RR 2d 801, 816-18 (1986); and *Policy Statement and Order in the matter of Elimination of Unnecessary Broadcast Regulations*, 50 FR 5583 (Feb. 11, 1985).

[46] *See Memorandum Opinion and Order* in MM Docket No. 83-540 et. al., released June 2, 1987, FCC 87-195. The settlement agreement states, in pertinent part, that the "waiver of the spot sale rule previously granted to SICC and Bahia will end as to each no later than three months after consummation of the sale of that company, or later at the request of the buyer but in no event more than six months following consummation, or immediately upon consummation if any buyer does not wish to retain SIN as both its network program supplier and national spot sales representative." *See Joint Petitionfor Severance, Approval of Settlement Agreement, Conditional Grant of Applications, and Related Relief*, Exhibit A, pp. 2-3, filed August 19, 1986. The Commission approved the settlement agreement without ruling on the merits of the ALJ's decision to terminate the waiver for these licensees. A *Petition for Reconsideration of Decision Approving the Settlement Agreement filed by TVL Corp.*, was dismissed by the Office of General Counsel (delegated authority) in an *Order* in MM Docket No. 83-540, FCC 871-108 (adopted November 4, 1987; Released November 5, 1987). The Commission's affirmation of the settlement agreement is now on appeal. *See, e.g., Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. filed June 26, 1987); *Hispanic Broadcasting System, Inc. v. FCC*, No. 87-1287 (D.C. Cir. filed June 26, 1987); *Hispanic Broadcasting Limited Partnership v. FCC*, No. 87-1299 (D.C. Cir. filed July 1, 1987); and *Spanish American League Against Discrimination v. FCC*, No. 87-1302 (D.C. Cir. filed July 1, 1987).

[47] *Id.* at footnote 28. On June 12, 1987, the Mass Media Bureau approved the assignment of the licenses of the five SICC stations and one Bahia station to Hallmark Cards Inc. *See Memorandum Opinion and Order*, DA 87-738, 2 FCC Rcd 3962 (1987) (adopted by delegated authority of the Chief, Mass Media Bureau). The sale was consummated on August 5, 1987. Applications for review of the Bureau's decision were filed on July 23, 1987, by the Hispanic Broadcasting Limited Partnership, Susan M. Jaramillo, Coalition for the Preservation of Hispanic Broadcasting, United States Hispanic Chamber of Commerce, TVL Corporation and the Spanish American League Against Discrimination. Since LatCom now owns Univision *(see note 4,supra)*, the affiliates of Univision that are also licensed to LatCom are exempted from the network representation rule. Thus, LatCom may now represent KDTV, KFTV, KMEX, KWEX, WLTV, and WXTV in the spot sale market and the waiver issue with respect to these stations is moot.

[48] *Id.*

[49] The Seven Hills Television Company and Sainte Limited filed comments in support of Univision's motion.

[50] Univision referred specifically to the *Second Report and Order* in MM Docket No. 83-842, (Elimination of Unnecessary Broadcast Regulation), 59 RR 2d 1500 (1986), where the Commission concluded "that the policies were premised upon only a 'potential' for abuse, rather than actual antitrust violations and that this is not an appropriate basis for regulation." *Id.* at 1515.

[51] This issue is moot since these six stations are now owned and operated by Univision and no longer subject to the TV network rep rule. See note 47, *infra*. The waivers of the network representation rule granted to KCSO, WCIU and KORO are unaffected by the settlement agreement. Univision also stated that some of its other affiliates have been operating pursuant to the spot sale waiver. *See Motion to Reopen Record for Limited Supplemental Commentsand Expedited Decision, supra,* p.8, n.4.

[52] *See Decision* by the Review Board, in MM Docket No. 83-657 and 84-838, adopted October 28, 1987.

[53] The Review Board rescinded the waiver as applied to Seven Hills on the basis that the Commission had not granted it a waiver of the rules in the first instance. Also, see note 24, *supra*.

[54] The Mass Media Bureau recently clarified the status of the waivers granted to Latinet and Telemundo, stating that these waivers will remain in effect until such time as the Commission completes action in the instant proceeding. See letters dated January 27, 1988, from the Chief, Mass Media Bureau to Susan Wing on behalf of John Blair and Company and its subsidiary, Telemundo Group, Inc., and to John Bankson on behalf of Latin International Network Corporation.

[55] "Where's Spanish TV Going?" *Television/Radio Age,* November 23, 1987, A30.

[56] "Targeting the Nation In its Own Tongue," *Channels/Field Guide* 1988, 83. Therein, Henry Silverman, the president of the Telemundo network, is quoted saying "[o]ur problem and opportunity is to bridge the gap between Hispanic purchasing power-about 6 percent of the U.S.-and the percentage of TV ad dollars spent reaching Hispanics: about 0.8 percent. If we can get our 'fair share,' that would represent nearly an eightfold increase [in ad sales]." This statement is consistent with the results of a general empirical analysis of the factors that influence radio broadcasting stations revenues. This study concluded that new radio stations in an average market are likely to attract the majority of their revenues from "new" advertising, as opposed to advertising taken from existing stations. James A. Brown, Jr., "Statistical Determinants of Radio Stations' Revenues and Trading Prices," Office of Plans and Policy Working Paper, August, 1982, pp. 3-4.

[57] *See Competition and Responsibility in Network Television Broadcasting,* 23 FCC 2d 382 (1970).

[58] *Competition and Responsibility in Network Television Broadcasting,* 25 FCC 2d 318, 333 (1970). The financial interest and syndication rule and the prime time access rule, as well as all the other "network" rules contained in Section 73.658 of the Commission's rules, apply only to those networks that affiliate with broadcast television stations. Networks that affiliate with other delivery media, such as cable or MDS systems, are not considered a "network" within the scope of these rules.

[59] *Id.*

[60] *See Christian Broadcasting Network,* 87 FCC 2d 1076, 1078 (1981).

[61] *Id.*

[62] *Id.* at 1079. The Commission stated that the 30 hours per week limitation appeared reasonable because it represented approximately one-third of the average network program offerings. Id. at 1078.

[63] *Id.*

[64] *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345, 94 FCC 2d 1019, 1104 n.111 (1983). The proposed rules identified ABC, CBS, and NBC specifically as the only television networks that were to be included in the rule.

[65] *Television,* 1987 Nielsen Report, p. 2.

[66] By "independent" broadcast stations, we mean stations not affiliated with the three major television networks.

[67] By comparison, the number of commercial network-affiliated stations increased only slightly from 600 to 628 during the same time period. *Television Factbook.*

[68] *Television and Cable Factbook,* Cable & Services Volume, 1987 Edition, No.55, p. A-41.

[69] *Broadcasting Magazine,* May 18, 1987, p.41.

[70] We note that cable advertising revenues are now only a small fraction of total television advertising revenues. For example, cable advertising revenues were in $1.2 billion in 1986. The growth in these revenues are expected to outstrip the growth in television and radio advertising sales, increasing at almost a 20 percent compound rate over the next few years. *See Broadcasting Magazine,* November 30, 1987, p. 94, citing forecasts of Veronis, Suhler & Associates.

[71] The analysis of the spot and advertising market was undertaken in the context of considering the competitive impact of increasing the ceiling restriction on national multiple ownership (Rule of Sevens). *See Report and Order* in General Docket No. 83-1009, adopted July 26, 1984, 100 FCC 2d 17. Citing the comments submitted by the U.S. Department of Justice in that proceeding, the Commission noted that network and spot, national or local, advertising were different products because:

> [f]irms that market nationally are not likely to find spot to be an effective substitute for network advertising in achieving nationwide coverage. Networks give advertisers access to a substantial portion of all television households at a specific time and day. Acquiring such advertising coverage through spot contracts would involve substantially higher. . . costs. Firms that sell in limited geographic areas, on the other hand, would not substitute network advertising for spot advertising. It would not be cost effective for such firms to pay to reach large numbers of viewers outside of the area in which they operate. Id. at para. 69.

The Commission also noted the Justice Department's conclusion that the relevant geographic markets are nationwide for network advertising and local for (national or local) spot advertising. It stated that although the major networks sell some regional advertising, the overwhelming amount of their advertising has national coverage. For spot advertising, the advertiser seeks to reach specific local markets. If the price is too high, the amount of advertising demanded may be lowered, but it will not be switched to another geographic market. *Id.* at para. 70.

[72] The lack of substitutability between network advertising and national spot advertising appears to describe advertising behavior with respect to "large" networks, i.e., where network advertising is intended to reach over 200 television markets simultaneously, and national spot advertising is intended to reach a relatively small group of local television markets. The behavior of small networks indicates, however, that they may compete with their affiliates for advertising revenues and, therefore, may have an incentive to influence their affiliates' advertising policy. This competition exists because the transactions cost barrier to substituting national spot for network advertising is not substantial when a network is comprised of a relatively small number of television stations. In this situation, it may be essential to the growth and development of a new network to be allowed to sell both national spot and network advertising time. Indeed, one arrangement that allows such a network to participate in both kinds of advertising sales but does not create an artificial incentive to prefer one kind of advertising over another is to establish a "pooling" arrangement, whereby the network and its affiliates share, based upon an

agreed-upon formula, in all advertising revenues regardless of their source. Such a commercial practice fosters an efficient business relationship between the network and its affiliates which is intended to facilitate their growth and development. We note, in this regard, that Univision has established such a pooling arrangement with its affiliates. *Initial Decision of Administrative Law Judge John H. Conlin* in MM Docket No. 83-540 et. al., released January 8, 1986, at para. 185.

[73] *Golden West Broadcasters,* 16 FCC 2d 918 (1969).

[74] *Report and Order* in BC Docket No. 80-438, 87 FCC 2d 668 (1981).

[75] *Second Notice of Proposed Rule Making* in the matter of *Elimination of Unnecessary Broadcast Regulation,* in MM Docket No. 83-842, 50 FR 5792 (1985).

[76] *See Second Report and Order* in MM Docket No. 83-842, adopted March 13, 1986, 51 FR 11914 (1986) at para. 47.

[77] In view of the Review Board's recent decision requiring Seven Hills (licensee of KTVW) to cease operating as if it has a waiver for this station, this particular situation will be resolved in the context of any adjudicatory appeals to the Commission.

[78] LatCom's purchase of Univision renders moot that part of SRA and Caballero's petitions addressing Univision's waiver with respect to the stations previously owned by SICC/Bahia.

STATEMENT OF COMMISSIONER JAMES H. QUELLO

Amendment of Commission's Rules Concerning Network Representation of TV Stations in National Spot Sales BC Docket No. 78-309

The *Further Notice of Proposed Rule Making* adopted by the Commission, proposes various modifications to our existing rule prohibiting networks from acting as station representatives for their affiliated stations. I can support the *Further Notice* because it proposes retention or slight modification of the existing regulation. While I have not prejudged any issues in this proceeding, I wish to express my grave concerns about eliminating the existing rule.

The Commission adopted the rule out of a concern for the potential harm to competition in broadcasting. *Network Representation of Stations in National Spot Sales,* 27 FCC 697 (1959), *recon. denied,* 28 FCC 447 (1960), *affirmed sub nom. Metropolitan Television Co. v. FCC,* 289 F.2d 874 (D.C. Cir. 1961). Obviously, there have been significant changes in the television industry since the rule was adopted. Nevertheless, I am far from convinced that the potential for anticompetitive activity, concentration of control, conflict of interest and undue influence by the networks over local broadcast stations' programming practices has been negated by evolution of the television marketplace.

My views on this subject are preliminary, Parties seeking to eliminate or modify the existing national spot sales rule bear a heavy burden to prove that the rule is inconsistent with the public interest. I welcome comments addressing my concerns.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Reply Refer To:
8210-SM

Adopted: April 28, 1988; Released: May 4, 1988

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

First Broadcasting Corp., Licensee
Radio Station WFBL(AM)
c/o Macmillan Ring-Free Oil Co., Inc.
90 Park Avenue
New York, New York 10016

Dear Sir or Madame:

This letter constitutes a Notice of Apparent Liability (NAL) for forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended. In your application (filed February 1, 1984) for renewal of license, you admitted that in 1982, through a series of maneuvers involving several transfers of First Broadcasting Corporation, ownership of First was transferred from its parent, Founders Corporation, to Macmillan Ring-Free Oil Co., Inc. without Commission approval. You did not seek Commission approval until February 21, 1984, when you requested *nunc pro tunc* approval of the transfer and grant of Macmillan's application for the station's renewal.

Section 310(d) of the Communications Act of 1934, as amended, states that:

> No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

In addition, Section 503(b) of the Communications Act of 1934, as amended, specifies that:

> [1] Any person who is determined by the Commission . . . to have (A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate or other instrument or authorization issued by the Commission; (B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States; . . . shall be liable to the United States for a forfeiture penalty. Section 503(b) of the Act also states that "[e]ach day of a continuing violation shall constitute a separate offense" and that the maximum forfeiture to be assessed may not exceed $20,000 for a broadcast station licensee.

Based on the evidence stated above, we conclude that you have apparently violated Section 310(b) of the Communications act of 1934, as amended, by the unauthorized transfer of control of the WFBL(AM) license. This occurred in 1982, and continues to the present.

Pursuant to Sections 503(b)(1)(A) and (B) of the Communications Act of 1934, as amended, you are hereby advised of your apparent liability for a $20,000 forfeiture for a willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2)(B) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

BY DIRECTION OF THE COMMISSION,

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-210

In re Applications of

TROPICAIR, LTD. File No. BPH-851028MA
(hereafter Tropic-Air)

CHARLES R. CRAWFORD File No. BPH-851028MB
(hereafter Crawford)

JAMES CONRAD DIAZ, SR. File No. BPH-851028MD
(hereafter Diaz)

JESS AND ISABELLE DRAKE, JOINT TENANTS File No. BPH-851028MF [Previously Dismissed]
(hereafter Drake)

For Construction Permit for
New FM Station, Channel 300C, 107.9MHZ
Aiea, Hawaii

HEARING DESIGNATION ORDER

Adopted: April 22, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* In a letter of June 10, 1986, the Chief, FM Branch returned the application of Drake because it specified less than the minimum facilities for a Class C station pursuant to 47 C.F.R. § 73.211(a). On July 14, 1986, Drake filed a petition for reconsideration of the return and simultaneously filed an amendment to specify facilities which meet the minimum for a Class C station. Drake seeks reinstatement *nunc pro tunc*. Tropic-Air and Crawford have filed oppositions to Drake's petition and Drake has filed a reply.

3. The Drake petition alleges that the action of the Chief, FM Branch "deprives the Drakes of their right to a full hearing on the basic and comparative merits of their application *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1947), and deprives the Commission of a full range of applicants from which to choose *Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971)." The petition further alleges that the error in its application resulted from a conservative interpretation by the applicant's consulting engineer of the Commission's 50,50 and 50,10 graphs, *See* , 47 C.F.R. § 73.333, and "that if the Commission maintained appropriate data bases for digitized F (50,50) and F (50,10) data, minor errors such as the instant ERP miscalculation would not occur." Drake also believes that its error is " *de minimis* " and that the Commission could have derived the needed information from the application as a whole. Finally, Drake contends that its amendment should be accepted pursuant to *Donovan Burke*, 60 RR 2d 110 (1986).

4. In the *Report and Order* in Docket 80-90, 48 Fed. Reg. 29486 (June 27, 1983), the Commission stated, in pertinent part, "new Class C stations will be required immediately to meet minimum facilities." On March 27, 1984, the Commission issued a *Public Notice*, "Clarification of FM Application Processing Procedures In Light of the Adoption of New Rules in BC Docket 80-90." 51 Fed. Reg. 26009 (July 18, 1986). In this document, the Commission stated, in part: "Applications for new stations filed on or after March 1, 1984 for Class B or C allotments will not be accepted unless they meet at least the minimum facilities for Class B or C." Finally, in a *Public Notice* of July 24, 1984 entitled "Further Clarification of FM Application Processing Procedures With Respect To The Adoption of New Rules in BC Docket 80-90," 51 Fed. Reg. 26009 (July 18, 1986), the Commission also stated that "[a]ll applicants for new Class C facilities must apply for 100 kilowatts at a minimum antenna height above average terrain (HAAT) of 300 meters (984 feet)." Accordingly, although Drake was on notice of the rule requirement, its application failed to comply with the applicable rule and was therefore properly returned. *See Nan E. Carlisle & Jittendra R. Patel*, FCC 88-148, FCC Rcd (adopted April 18, 1988, released , 1988).

5. With respect to Drake's belief that its error is *de minimis* and that the Commission could have derived the needed information from the application as a whole, it is axiomatic that an applicant seeking a construction permit for a new FM broadcast station specify the Effective Radiated Power (ERP) and Height of Antenna Above Average Terrain (HAAT). FCC Form 301 requires this information to be provided in several items of Sections V-B and V-G. This information is used to determine whether the proposal will provide principal community coverage in accordance with 47 C.F.R. § 73.315(c) and whether or not interference to other broadcast stations will result. The absence of ERP and HAAT data complying with 47 C.F.R. § 73.211(a) was fatal to the acceptance of Drake's application. The staff has neither the authority nor the ability to extrapolate ERP and HAAT figures in compliance with the rules from mistaken data provided in an inaccurate application.

6. Additionally, Commission technical rules require applicants for new FM stations to adhere to the F 50,50 and 50,10 graphs. *See* 47 C.F.R. § 73.333. Speculation as to what might have occurred with respect to Drake's application had the Commission made available digitized F 50,50 and 50,10 graphs is not relevant to the applicant's failure to adequately interpret the graphs, nor is the absence of the digitized graphs justification for acceptance of Drake's late-filed amendment, as Drake's petition alleges.

7. Under the new "window" processing rules adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) an applicant is provided a 30-day period (running from the release of a *Public Notice* announcing the tenderability of the application)[1] to perfect its application for filing. Afterward, the filing of amendments is severely constrained. 50 Fed. Reg. at 19941. These constraints are set forth in 47 C.F.R. § 73.3522(a)(6):

> [Commercial FM applications] may be amended as a matter of right during the appropriate [filing] window . . . For a period of 30 days following the FCC's issuance of a Notice of Tenderability announcing the acceptance of the applications [for tender], amendments that go to the acceptability or grantability of an application may be filed as a matter of right. Subsequent [predesignation] amendments . . . will be considered only upon a showing of good cause for late filing or pursuant to 47 C.F.R. Section 1.65 or [47 C.F.R.] Section 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration . . .

8. Thus, except in certain circumstances,[2] not pertinent here, predesignation amendments going to acceptability are not permitted after 30 days from the issuance of the *Public Notice* announcing the acceptance for tender of a given application. Drake's corrective amendment is thus untimely.

9. In *Donovan Burke, supra*, the Commission stated:

> Effective upon release of this Order, an applicant who files an application which specifies a short-spaced site and its [sic] mutually exclusive with an application specifying a fully-spaced site shall no longer be afforded the 30-day curative amendment opportunity established in Trend Broadcasting. [3] However, any application involving a 'Trend' situation which was filed prior to the release date of this Order [April 18, 1986] shall be permitted to submit a curative amendment specifying a fully-spaced site within 30 days of the notice that its request for waiver has been denied. *Donovan Burke* at pp. 112-113.

10. It is clear, therefore, that the former procedures set forth in *Donovan Burke* pertain only to applications returned after the Commission has denied a short-spacing waiver request. Since the Drake application was not short-spaced, but was found unacceptable for failure to comply with the Commission's technical requirements for a Class C station, the provision of *Donovan Burke* for acceptance of a late-filed currative amendment is not pertinent to the Drake application.

11. Furthermore, while it may be desirable to have a number of qualified applicants from which to select a broadcast licensee, the Commission has, in *Chudy Broadcasting Corporation*, 58 RR2d 133, 134, n. 7 (1985), modified its position with respect to *Azalea, supra*. In that proceeding, the Commission stated, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the institution of new service."

12. For the reasons set forth above, Drake's petition for reconsideration will be denied and the associated amendment will be returned as unacceptable for filing. Furthermore, in light of the action taken herein, the objections of Tropic-Air and Crawford will be dismissed as moot.

13. *Tropic Air*. The applicant's response to Section V-B, Item 5 indicates that its proposed antenna will only be horizontally polarized. However, in response to Item 6, Section V-B, Tropic Air indicates that the antenna is to be circularly polarized. Accordingly, Tropic Air will be required to provide a clarifying amendment regarding this inconsistency.

14. *Diaz*. The applicant proposes to side-mount his antenna on the existing tower of KXPW (formally KULA). In Diaz's application, the overall height of the tower above sea level is stated as 728 meters. However, Commission files indicate the height above mean sea is 726 meters. This error has no effect on the acceptability of Diaz's application, which complies with all of our technical acceptance requirements for a Class C facility. Accordingly, Diaz will be required to provide a clarifying amendment.

15. *Other Matters*. Engineering study of the applications of Tropic-Air, Crawford, and Diaz, has revealed noncompliance with ANSI C95.1-1982 exposure guidelines for human exposure to radio frequency radiation as outlined in OST Bulletin No. 65 (October, 1985). Consequently, we are concerned that these applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GN Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the applicant is subject to environmental processing under the Section 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. Since the proposals of these applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Tropic-Air, Crawford, and Diaz will be required to file within 30 days of the release of the Order an Environmental Assessment with the presiding Administrative Law Judge.[4] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

16. The Field Operations Bureau has determined that, "due to the proposed stations' proximity to the Commission's Honolulu Monitoring Station, the predicted field intensity from the proposed facilities would cause degradation of our VHF and UHF monitoring abilities." In order to avoid degradation of the monitoring facility at Honolulu, the Mass Media Bureau imposes the following condition on the construction permit of the successful applicant in this proceeding:

> The authority granted herein is subject to the conditions that the resulting measured field intensity is no greater than 27 mV/m at the Commission's Honolulu, Hawaii Office and that, in the event of interference to FCC monitoring operations, the licensee shall take such immediate corrective action as is necessary to eliminate the interference. This shall include responsibility for furnishing, installing, and adjusting filter circuits, shielding or other cor-

rective devices which may be necessary to eliminate transmitted interference. If these measures fail to eliminate the interference, and/or if the field intensity exceeds 27 mV/m, the licensee shall immediately reduce power and/or adjust the antenna pattern to comply. In addition, the permittee/licensee shall immediately apply for Special Temporary Authority (STA) and shall file an application for construction permit to the Commission for altered parameters.

17. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Tropic-Air	August 19, 1987; September 22, 1987

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Tropic Air, Crawford, or Diaz in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 2- 12 above, Drake's petition for reconsideration IS DENIED and the associated amendment IS RETURNED AS UNACCEPTABLE FOR FILING.

21. IT IS FURTHER ORDERED, That the objections filed by Tropic-Air and Crawford to Drake's petition ARE DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That Tropic Air shall submit to the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment clarifying whether it will employ horizontal or circular polarization.

23. IT IS FURTHER ORDERED, That Diaz shall submit to the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment reflecting the correct height above mean sea level of the tower on which it proposes to mount its antenna.

24. IT IS FURTHER ORDERED, That in accordance with paragraph 15 hereinabove, Tropic Air, Crawford, and Diaz shall submit environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with copies to the Chief, Audio Services Division.

25. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Tropic-Air (8/19/87 & 9/22/87).

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Such a notice for the applications filed for Aiea, Hawaii was released on November 12, 1985.

[2] Late filed predesignation amendments will be considered only upon a showing of good cause or pursuant to 47 C.F.R. § 1.65, which requires prompt amendment to reflect significant changes in information previously given in an application or pursuant to 47 C.F.R. § 73.3514.

[3] *See Trend Broadcasting, Inc.*, 18 FCC 2d 745 (1969).

[4] This study must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-227

In re Applications of

TELECOMMUNICATIONS NETWORK, INC.
(hereafter Network) File No. BPH-860523ME

DENISE A. SCHACHT & RONALD E. SCHACHT d/b/a MOUNTAIN BROADCASTING
(hereafter Mountain) File No. BPH-860530MH

For Construction Permit for a New FM Station on Channel 229A in Dallas, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *EEO*. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Network and Mountain have not listed any source for attracting minority job applicants. Accordingly, each of the applicants will be required to amend their applications to provide the information described above.

3. An engineering study reveals that the predicted 1mV/m contour depicted on Mountain's contour map (Exhibit E-10B) disagrees with the data given in response to Item 15, Section V-B of FCC Form 301. Specifically, the distance to the 1mV/m contour along the zero degree radial is listed in Section V-B, Item 15 as 21.4 kilometers. However, the value plotted on the contour map (Exhibit E-10B) along the zero degree radial is approximately 25.5 kilometers. This error has no effect on the acceptability of Mountain's application, which complies with all of our technical acceptance requirements. Accordingly, Mountain shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order correcting its contour map and predictions of population and coverage.

4. Network has petitioned for leave to amend its application on January 5, 1988. The accompanying amendment was filed after June 12, 1986, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Network and Mountain shall file the information, as specified in paragraphs 2 and 3 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Network

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of

the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-229

In re Applications of

DWIGHT BROADCASTING COMPANY (hereafter DBC) — File No. BPH-870522MF

IMAGERY, INC. (hereafter Imagery) — File No. BPH-870522MI

For a Construction Permit for a New FM Station on Channel 255A (98. 9 MHz) in Dwight, Illinois

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released : May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. J. Collins Miller and Candace J. Miller, principals of DBC, are 53% owners of Livingston County Broadcasters, Inc., the licensee of Stations WPOK(AM) and WJEZ(FM), Pontiac, Illinois. Both principals have indicated that in the event a construction permit is issued in this proceeding to DBC, they will divest themselves of all interests in these two stations. Accordingly, an appropriate condition will be specified below.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Imagery	August 28, 1987

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if either.

7. IT IS FURTHER ORDERED, That in the event a construction permit is awarded in this proceeding to DBC, J. Collins Miller and Candace J. Miller, prior to commencing program test authority, will dispose of their interests in Livingston County Broadcasters, Inc., licensee of WPOK(AM) and WJEZ(FM), Pontiac, Illinois.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Imagery.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-230

In re Applications of

MARKEY BROADCASTING COMPANY, INC. (hereafter MarKey)	File No. BPH-860113ME
VERMONT BROADCAST ASSOCIATES, INC. (hereafter VBA)	File No. BPH-860113MF

For Construction Permit for a
New FM Station on Channel 252A
in Lyndon, Vermont

HEARING DESIGNATION ORDER

Adopted: May 2, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary matters*. VBA requests a waiver of 47 C.F.R. § 73.207 with regard to the required separation from its proposal to WQCR(FM), Burlington, Vermont. VBA's proposal in Lyndon, Vermont is short- spaced to WQCR(FM), Burlington, Vermont by 0.7 kilometers. The Channel 252A allotment to Lyndon, Vermont, however, is itself short-spaced to WQCR(FM) by 0.8 kilometers as a result of the Commission's action in the *Report and Order* in MM Docket 80-90, 94 FCC 2d 152 (1983), which amended 47 C.F.R. § 73.211(a) by increasing the required separation from 104.6 kilometers to 105 kilometers. That Docket also changed 47 C.F.R. § 73.208 to specify rounding to the nearest kilometer, not mile, when computing separations. VBA's proposal, therefore, is less short-spaced than the allocation itself. Because VBA's proposal, filed in response to an allotment created prior to the Commission's action under the *Report and Order* in MM Docket 80-90, *supra*, fails to comply with the minimum distance separation to WQCR(FM) required by 47 C.F.R. § 73.207 solely as the consequence of metrication mandated therein, the spacing requirement in effect prior to MM Docket 80-90 will be used. *See Memorandum Opinion and Order* in MM Docket No. 84-293, 2 FCC Rcd 1293 (1987). Accordingly, VBA's waiver request is dismissed as moot.

3. VBA also requests a waiver of 47 C.F.R. § 73.315(a), which requires that applicants provide a 3.16 mV/m (70 dBu) signal to the entire proposed city of license. VBA's proposal provides the requisite coverage to 91.1% of the principal community. The FM Branch does not require waiver of 47 C.F.R. § 73.315(a) unless the proposed 70 dBu coverage falls below 80% of the area of the proposed city of license. *See , e. g., John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also A. B. C. D. Broadcasting*, 2 FCC Rcd 6551 (1987) (Hearing Designation Order). Consequently, VBA's waiver request is dismissed as moot.

4. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the 5-point model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the applicant listed below will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
VBA	Failed to identify specific sources of recruitment specializing in minority candidates.

5. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
MarKey	January 15, 1987; June 30, 1987; March 4, 1988

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

9. IT IS FURTHER ORDERED, That for the reasons set out in paragraphs 2-3 above, VBA's requests for waivers of 47 C.F.R. §§ 73.207 and 73.315(a), respectively, ARE DISMISSED AS MOOT.

10. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirements of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge: VBA.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: MarKey.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The application filed by Etta Dodge, BPH-851203MF, was returned by staff letter of October 23, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-225

In re Applications of

SPRING ARBOR COLLEGE (WSAE)
(hereafter Spring Arbor)
Spring Arbor, Michigan — File No. BPED-790806AA

BOARD OF TRUSTEES/OLIVET COLLEGE
(WOCR)
(hereafter Olivet)
Olivet, Michigan — File No. BPED-800303AD

For Construction Permit for
Modification of Noncommercial
FM Facilities

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has under consideration the above-captioned mutually exclusive applications.

2. *Preliminary Matter.* Spring Arbor and Olivet are proposing to change their transmitting facilities, located approximately 44.6 kilometers apart. Spring Arbor requests a change in Channel from 207B to 209B; Olivet proposes to upgrade its class from 209D to 209A. Pursuant to 47 C.F.R. § 73.509(a), in pertinent part, applications for modified noncommercial FM facilities will not be accepted if the proposed operation of co-channel facilities involves overlap of the interfering (40 dBU) and protected (60 dBU) signal strength contours of the respective stations. According to our engineering analysis, it is clear that Olivet's protected contour is located completely within Spring Arbor's interfering contour. Since Olivet's application was filed more than three months prior to the June 16, 1986 cut-off date for applications mutually exclusive with Spring Arbor's proposal, grant of one application would effectively preclude grant of the other. Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1948).[1]

3. *Spring Arbor.* Spring Arbor proposes to sidemount its transmitting antenna on a tower 2.6 kilometers West of Horton, Michigan. The tower is also used by broadcast station KTGG (AM). Our study indicates that this proposal may exceed the radio frequency guidelines under 47 C.F.R. § 1.1307(b). Since its proposal may therefore have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Spring Arbor is required to submit the environmental impact information described in 47 C.F.R. § 1.1311, specifically demonstrating compliance with the RF radiation guidelines noted in OST Bulletin No. 65 entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation" (October, 1985). This showing should take into account radiation from nearby antennas which would add to the radiofrequency radiation at the tower base. Since the FM antenna is mounted on an AM tower, fencing at the tower base may be required. Spring Arbor's showing should include the distance from the tower base to the fence in order for the site to comply with the prescribed standards. Accordingly, Spring Arbor will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. *Olivet.* Applicants for broadcast stations are required by 47 C.F.R. § 73.3580(f) to give local notice of the filing of their applications. We have no evidence that Olivet published the required notice. To remedy this deficiency, Olivet must publish local notice of its application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the date of release of this Order, or an appropriate issue will be specified.

5. *Other matters.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

7. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Spring Arbor, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1309 of the Commission's Rules.

2. To determine (a) the areas and populations which would receive primary aural service from the proposal of Olivet and the availability of other primary service to such areas and populations; (b) the areas and populations which would gain or lose primary aural service from the proposals of the applicants for modification of existing facilities and the availability of other primary service to such areas and populations; and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; whether share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Spring Arbor shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That Olivet shall inform the presiding Administrative Law Judge within 30 days of the release of this Order as to whether local notice of filing of its application has been published.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(a)(2), and Section 73.3594 of the Commission's Rules, 47 C.F.R. § 73.3594, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of such notice as required by Section 73.3594(g) of the Rules, 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Objections filed in 1983 by the University of Michigan and Michigan State University against Spring Arbor's petition to the Commission for Channel 216A have been rendered moot by the college's decision to pursue Channel 209B.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-226

In re Applications of

WORTH M. MILLER File No. BPH-870514MK
(hereafter: Miller)

MEGAN H. McWILLIAMS File No. BPH-870515NI
(hereafter: McWilliams)

For a Construction Permit
for a New FM Station on Channel 267A
in Narrows, Virginia

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *McWilliams*. In response to Section VI, FCC Form 301, McWilliams has indicated that she will employ five or more fulltime employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by McWilliams is deficient in that it fails to identify at least one female-oriented recruitment source for Narrows. Accordingly, McWilliams will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That McWilliams shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-228

In re Applications of

VISALIA BROADCAST LIMITED PARTNERSHIP (hereafter: VBLP)	File No. BPH-870331NJ
SHARRYLE G. CHUNG EURICH & ROBERT EURICH d/b/a OAK TREE BROADCASTING (hereafter: Oak Tree)	File No. BPH-870331PE
STILLWELL BROADCASTING LIMITED (hereafter: Stillwell)	File No. BPH-870415KQ

For a Construction Permit
for a New FM Station on Channel 241A
in Visalia, California

HEARING DESIGNATION ORDER

Adopted: April 29, 1988; Released: May 13, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Financial Qualifications*. The material submitted by Stillwell does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency: Answer of "no" to Items 1 and 2, Section III, FCC Form 301 (April 1985), certifying that it does not possess the financial resources to construct and operate the station.

3. *EEO*. In response to Section VI, FCC Form 301, VBLP and Stillwell have indicated that they will employ five or more fulltime employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by VBLP is deficient in that it fails to identify at least one Hispanic-oriented recruitment source for Visalia, which lies within the Fresno statistical metropolitan area in which the dominant minority, comprising 25.4% of the population, is Hispanic.[2] Stillwell's EEO program is deficient in that it fails to identify publications it will utilize in attracting women and minority candidates, listing instead only a women's organization, the National Organization of Women. Accordingly, VBLP and Stillwell will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *Late - Filed Amendment*. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT
Oak Tree	November 17, 1987

5. *City Coverage*. 47 C.F.R. § 73.315(a) requires that an applicant provide a 3.16 mV/m (70 dBu) signal to the entire proposed community of license. VBLP, Oak Tree and Stillwell have indicated that their 70 dBu contours will encompass 93.4%, 97.2% and 99%, respectively, of the proposed community of license, and have requested waiver of 47 C.F.R. § 73.315(a). The FM Branch, however, considers an applicant to be in substantial compliance with, and thus does not require waiver of, the city coverage requirement where the proposed 70 dBu contour covers more than 80% of the area of the community of license. *See* Letter *to Southwest Communications, Inc.*, from Dennis Williams, Acting Chief, FM Branch (Reference 8920-HVT), released July 16, 1986, citing *John R. Hughs*, 50 Fed. Reg. 5,679 (1985). Accordingly, the applicants' waiver requests will be dismissed as moot.

6. *Air Hazard*. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the applicant below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the following applicant would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding: VBLP

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Stillwell, in light of the evidence adduced concerning the deficiency set forth in paragraph 2 above, is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: VBLP

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Stillwell shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, that the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein. *APPLICANT:* Oak Tree

11. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by the following applicants ARE DISMISSED AS MOOT: VBLP, Oak Tree, Stillwell

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 3, 1988**, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Mark A. Miller (File No. ARN-870331PW) was returned on May 20, 1987, prior to designation. Miller has not filed a timely petition for reconsideration.

[2] VBLP has also listed an organization in its EEO program as a recruitment source, O.A.R. Fresno, which is unfamiliar to the staff. In the event this organization satisfies the Hispanic or any other EEO recruitment requirement, VBLP may amend its EEO program to describe the organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-38

In re Applications of

MOUNTAIN MEDIA, INC. File No. BPH-851018MC

For Construction Permit for a
New FM Station on Channel 241A
in Warren, Vermont

Appearances

Peter H. Doyle on behalf of Mountain Media, Inc.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Adopted: May 5, 1988; Released: May 13, 1988

INTRODUCTION

1. The only remaining applicant, Mountain Media, Inc. (MMI) faces a contingent environmental impact issue. *See* 53 F.R. 10152 published March 29, 1988, Issue 1.

2. On April 14, 1988, MMI petitioned for leave to file an environmental assessment. That petition was granted, and the assessment was forwarded to the Chief, Audio Services for his evaluation. *See* FCC 88M-1295, released April 29, 1988. He issued his evaluation on May 3, 1988. There he concludes: " . . . that there will be no adverse environmental impact if the measures to protect humans from nonionizing radiation are carried out as proposed . . . ;" that a grant of MMI's construction be subject to an environmental condition; and that MMI's contingent environmental impact issue be deleted from the Hearing Designation Order.

PRELIMINARY RULING

3. The Bureau's request will be granted, and the Chief's condition will be added. Granting the request will obviate the need for hearing on the RF radiation problem, and conserve the Commission's resources.

FINDINGS OF FACT

4. When the Chief, Audio Services Division redesignated this case for hearing, he said this about MMI's proposal: "Engineering study indicates that this proposal may significantly exceed the ANSI C95.1-1982 exposure guidelines for human exposure to radio frequency (RF) radiation in the transmitter building as outlined in OST Bulletin No. 65 (October 1985)." So he designated a contingent environmental impact issue against MMI, and called on MMI to submit an environmental assessment on or before April 15, 1988.

5. As noted MMI filed their environmental assessment on April 14, 1988, their amendment was accepted, and the assessment was forwarded to the Chief, Audio Services for his evaluation. He has recommended that MMI's application be granted subject to a specified environmental condition.

CONCLUSIONS OF LAW

6. The Chief's request is granted, and contingent environmental Issue 1 will be deleted. Since there are no other basic qualifying issues outstanding against them, since they are the only remaining applicant, and since they are otherwise qualified to construct and operate as proposed, MMI's application can be granted now.

SO the Chief, Audio Services Division's May 3, 1988 environmental evaluation, recommendation, and request IS GRANTED;

Issue 1 at 53 F.R. 10152 *supra*. IS DELETED; and Unless an appeal is taken from this Summary Decision or the Commission reviews it on their own motion, Mountain Media Inc.'s application (File No. BPH-851018MC) IS GRANTED[1] subject to the following condition:

> "Before program test authority is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, Oct. 1985). The fence must be of a type which will preclude casual or inadvertent access and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the Form 302, application for license, and the request for Program Test Authority."

This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTE

[1] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Monetary
Forfeiture Against

DAVID G. ACKLEY 3153204-009
P.O. Box 4383
St. Thomas, U.S.V.I. 00801

Licensee of Station W4UWH and holder
of a Technician Class Operator
License in the Amateur Radio Service

ORDER

Adopted: March 7, 1988; Released: May 5, 1988

By the Commission:

1. The Commission has before it an application for review filed September 10, 1987, by David G. Ackley, licensee of amateur station W4UWH and holder of a Technician Class operator license. He has applied for review of a monetary forfeiture of $1,450 issued by the Chief, Field Operations Bureau, for the improper operation of his amateur station. This forfeiture was imposed for violation of the following Commission rules: 97.7(b)[1] (transmitting on a frequency not authorized to the holder of a Technician Class operator license), 97.84 (failure to perform the station call sign identification procedure) and 97.125 (causing interference to another radio communication), 47 C.F.R. §§ 97.7(b), 97.84 and 97.125.

2. There has been a lengthy exchange of correspondence between Mr. Ackley and the Commission concerning this forfeiture, and we have carefully reviewed all the material in the record. Commission personnel confirmed an interference signal through monitoring and, using sophisticated direction- finding techniques, determined that the signal was emanating from Ackley's residence. Immediately thereafter, amateur station W4UWH was inspected and found to be capable of causing the interference. The use of direction finding equipment by Commission engineers has been accepted as a valid means of establishing the source of objectionable interference. *See Harold R. Claypoole*, 95 FCC 2d 331 (1983); *James W. Smith*, 102 FCC 2d 258 (Rev. Bd. 1985); *Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982). All violations cited relate to this interference event.

3. There is nothing in Mr. Ackley's application for review or elsewhere in the record that warrants cancellation or reduction of this forfeiture. We affirm the decisions and conclusions reached by the Chief, Field Operations Bureau, in this matter in all respects.

4. Accordingly, IT IS ORDERED that David G. Ackley's application for review IS DENIED. IT IS FURTHER ORDERED that he pay his monetary forfeiture of $1,450 within thirty days from the date of release of this *Order*. Payment should be made by check or money order payable to the Federal Communications Commission and sent to the Fiscal Accounting Section, Room 452, Federal Communications Commission, Washington, D.C., 20554. The number 3153204-009 should be placed on the remittance.

5. IT IS FURTHER ORDERED that a copy of this *Order* be mailed to David G. Ackley at the address shown in the caption, and to his attorney, David L. Nace, at Lukas, McGowan, Nace & Gutierrez, Chartered, 1819 H Street, N.W., Seventh Floor, Washington, D.C., 20006.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTE

[1] Effective March 1, 1986, the portion of 47 C.F.R. § 97.7(a) that specified Technician Class amateur operator privileges was redesignated as 47 C.F.R. § 97.7(b). *Report and Order*, PR Docket No. 85-23, 51 Fed. Reg. 2712 (1986). *See* also 47 C.F.R. § 97.7(f). Some early correspondence in this matter cited 47 C.F.R. § 97.7(a) instead of 47 C.F.R. § 97.7(b). This error is not material, however, and has not been detrimental to Ackley in any way.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of the
Commission's Rules and
Establishment of a
Joint Board

ORDER INVITING COMMENTS AND REQUEST FOR DATA

Adopted: May 4, 1988; Released: May 17, 1988

By the Federal-State Joint Board:

I. INTRODUCTION

1. The Federal-State Joint Board hereby seeks further comment and data concerning the procedures used by carriers to separate marketing expenses between the state and interstate jurisdictions. We request comment on a proposed method of categorizing and allocating marketing expenses that may more accurately reflect cost-causation principles.

2. We request data concerning the marketing expenses incurred by the local exchange carriers (LECs) in promoting interstate access services provided to interexchange carriers (ICs) and end users. We also request interested parties to comment on alternative cost causation approaches for allocating marketing expenses between the state and interstate jurisdictions that reflect cost-causation principles.

II. BACKGROUND

3. In 1986, the Commission revised the Uniform System of Accounts (USOA),[1] thus necessitating conformance of the Separations Manual, formerly codified as Part 67 of the Commission's Rules, to the new accounting rules. To accomplish conformance and to simplify the separations rules, the Commission established the Joint Board in CC Docket No. 86-297.[2] Under Part 67 of the Commission's Rules, marketing expenses were allocated between the jurisdictions on the basis of local and toll revenues, including access revenues. In revising the Separations Manual, the Joint Board in CC Docket No. 86-297 recommended, and the Commission adopted, new procedures which allocated marketing expenses on the basis of revenues excluding access revenues. [3] Several LECs and the United States Telephone Association (USTA) filed petitions for reconsideration of that decision, arguing that a significant shift in revenue requirement to the state jurisdiction would result from the exclusion of access revenues in contravention of the Joint Board's goals in that proceeding.[4] In response to those petitions, the Commission issued a *Supplemental NPRM* [5] requesting comments and data and referring the issue to this Joint Board. On reconsideration, the Commission decided to include access revenues in the allocation factor for marketing expenses as an interim measure pending the outcome of further inquiry.

4. In the *Supplemental NPRM*, the Commission stated that, despite the revenue requirement shift identified by the LECs and USTA, the exclusion of access revenues, or some portion of them, from the allocation factor for marketing expenses may be appropriate. The Commission requested that the LECs specifically identify their marketing activities that are related to access service and any such activities that are related to a specific jurisdiction. The Commission requested comment on the appropriate allocation factor and recovery mechanism for marketing expenses. The Commission specifically asked parties to comment on the exclusion of all or some portion of access revenues from the allocation factor (*e.g.*, subscriber line or carrier common line revenues) and the ability of carriers to assign directly some portion of marketing expenses to the state or interstate jurisdiction. The Commission also sought specific proposals for alternative allocation factors and cost recovery mechanisms that, for example, may not be revenue-based, or may incorporate a weighting factor or phase-in approach.

5. The Commission also requested that LECs submit data that both the Commission and the Joint Board could use in evaluating the proposals received in response to the *Supplemental NPRM*. The Commission requested that the LECs provide annualized data using a representative month in 1987 that in the LECs' opinion reflects annual expenditures for marketing expenses for 1987. The data request also asked LECs to map the marketing expenses in the former Part 31 USOA to the marketing expenses in the revised Part 32 USOA and solicited specific information regarding the LECs' revenue requirement associated with marketing expenses. The Commission requested that the LECs map marketing expenses from the original USOA to the revised USOA because the Commission made numerous changes regarding the kinds of expenses that are recorded in the marketing-related accounts. In many instances, expenses that were previously recorded in Part 31 marketing accounts are no longer included in Part 32 marketing accounts. Under the former Part 31 USOA, most marketing expenses were recorded in the following marketing accounts: Account 640, General Commercial Administration; Account 642, Advertising; and Account 643, Sales. The revised Part 32 USOA accounts for marketing expenses are: Account 6611, Product Management; Account 6612, Sales; Account 6613, Advertising. Account 6610, Marketing is a summary account for Accounts 6611, 6612, and 6613 for Class A telephone companies and a single marketing expense account for Class B companies.[6] For separations purposes, marketing expenses for both Class A and Class B carriers are currently allocated between the jurisdictions based on the amounts recorded in the summary Account 6610. Finally, the data request asked the LECs to report the billed revenues used in allocating marketing expenses and to identify the specific portion of marketing expense associated with interstate access service provided to ICs.

III. SUMMARY OF COMMENTS

6. Twenty states, twelve LECs, and USTA filed comments arguing that the marketing activities performed by the LECs benefit ICs both directly and indirectly and that the LECs should, therefore, be able to recover a portion

of marketing expenses from the ICs.[7] These parties, and NARUC support the adoption of the interim allocation factor which includes access revenues. This position is opposed by AT&T and MCI.

7. Many parties discussed various activities and services provided by LECs that, they claim, promote access services.[8] For example, Ameritech states that it employs access product development personnel who assess changing marketing conditions and the needs of ICs, then develop access service products to meet those needs. Ameritech states that it has marketing groups to handle IC accounts and costs relating to the marketing of Open Network Architecture (ONA). NYNEX states that the following activities are required for a LEC to provide interstate access: (1) product and service identification and specification; (2) demand forecasting; (3) product life cycle analysis; (4) pricing analysis; (5) identification and establishment of distribution channels; and (6) development of strategies to stimulate sales of access services. In addition, NYNEX claims that the Bell Operating Companies (BOCs) provide small independent operating companies with training and guidance on appropriate billing methodologies for access service. New Jersey states that LECs provide: (1) sales design engineering which determines specific access service configuration; (2) service cost analysis for new access services; (3) market assessment and demand forecasts for access services; (4) development of the access rate structure; (5) preparation of tariff filing packages for new access services; and (6) preparation of annual FCC access tariff filings. Idaho submits that US West has over 450 marketing employees actively working on access services. SNET maintains that LECs have submitted detailed descriptions of marketing efforts that support the ICs and it disagrees with MCI's assumption that sophisticated carriers are the only ones that order access. SNET claims that it sells access service to end users and resellers which require considerable assistance in selecting the appropriate access service. Additionally, SNET states that it provides MCI with product management in support of access tariff services that MCI purchases and sales personnel that interact with MCI operations personnel to forecast and plan access tariffs.

8. AT&T maintains that the current allocation factor produces an excessive interstate allocation. AT&T argues that although the marketing of access services represents only a small percentage of the LECs' overall marketing effort, more than 25 percent of the LECs' total marketing expenses are assigned to the interstate jurisdiction when access revenues are included in the allocation factor. AT&T further argues that the current allocation factor including access revenues was reasonable prior to 1984 when services were provided on an integrated basis and revenues were shared by the BOCs and AT&T on the basis of costs incurred. AT&T contends that with the elimination of division of revenues and implementation of access charges, the current allocation results in the assignment to the interstate jurisdiction of marketing costs incurred for functions that are not performed by the LECs because they are performed by AT&T.

9. SWB replies that AT&T's argument that the current allocation factor results in excessive interstate allocations is factually unsupported. SWB contends that it performed a detailed study and analysis of the nature of expenses in Account 6610, which showed that the current allocation factor reasonably reflects cost-causation principles. It claims that the study clearly revealed that state and interstate services benefit significantly from its marketing activities and concludes that the difference between the interstate assignment using the current allocation factor and the interstate assignment using its detailed analysis would be only 1.7 percent. SWB therefore argues that the current method including access revenues is reasonable and should be retained permanently. AT&T criticizes this study in its second *ex parte* presentation stating that it is circular in its reasoning because SWB assigned costs on the basis of revenues rather than on the basis of functions performed. SWB, in its second *ex parte* filing, defends its study and emphasizes that it used actual company records and interviews with the personnel that generate marketing expenses.

10. AT&T argues that the inclusion of access revenues in the allocation factor assigns substantial LEC advertising costs to the interstate jurisdiction even though little advertising is actually performed by the LECs to market interstate access service. AT&T also maintains that it cannot recover its marketing costs, such as advertising for interstate service, from the LECs, even though these expenditures affect the demand for LECs' state access, "corridor," and intraLATA toll services. Therefore, AT&T argues that it should not be required to pay such a large portion of the LECs marketing expenses.

11. MCI and AT&T argue that although several LECs, including Ameritech and Bell Atlantic, attempted to show that advertising expenses incurred on behalf of their local and state toll services do benefit access customers, these efforts often subsidize LEC advertising for services which compete directly with MCI and AT&T. AT&T and MCI provide examples of advertising for services provided by the LECs that AT&T and MCI claim are clearly competitive with their services. Therefore, they argue, the cost of advertising state, local, and toll should be assigned directly to the state jurisdiction.

12. The LECs claim that advertising state services will benefit interstate access services by increasing the demand for services provided by both the LECs and ICs. The LECs also claim that by stimulating local usage, access expenses are lowered. According to MCI, this conclusion is incorrect because the demand for local exchange service is extremely inelastic and penetration levels are quite high. MCI concedes that although the advertising of LEC-provided toll could conceivably stimulate interstate toll demand, any benefit is indirect and, therefore, the current interstate allocation of 28 percent is excessive in relation to any possible benefit. In response, SWB argues that advertising enhances local, toll, and access revenues and, therefore, recovery of those costs from local, toll, and access customers is appropriate. In its second *ex parte* filing, SWB argues that campaigns that stimulate demand for second lines and for central office switched service have an impact on access service because increased revenues are derived as a result of any increases in access lines. NYNEX and SWB maintain that MCI is wrong in its allegation that LECs have no reason to market access service because the LECs are monopolies. NYNEX and SWB claim that the existence of bypass alternatives to the network requires marketing efforts to inform ICs and end user customers about numerous and complex service offerings. SWB also claims that MCI's own practice of selecting competitive access alternatives to LEC-provided access services contradicts its characterization of the market as a monopoly. Ameritech argues that it will incur costs relating to the marketing of ONA to the industry.

Michigan claims that LECs have been forced to develop a new market structure for ONA, which, it argues, is a purely interstate offering in those states that prohibit state competition. MCI disagrees with the argument regarding ONA and cites this as an example of a misallocated marketing expense. It claims that since this service will be used primarily by enhanced service providers, who do not pay access charges, none of the associated marketing expenses should be allocated to access services.

13. DC argues that LECs vigorously market local loop service to residential, commercial, and other customers and that each local subscriber line generates interstate revenues in the form of carrier common line and subscriber line charges. DC contends that failure of the LECs to promote local loop services could lead to lower state and interstate revenues which would result in increased rates in both jurisdictions. DC further maintains that the new Link-Up America program will increase the number of subscribers to the public switched network and will generate additional expenses which should be shared by both jurisdictions.

14. AT&T and MCI argue that several parties provided arguments which showed that expenses were assigned to Account 6610, such as order processing and carrier relations, that should have been assigned to other accounts. Seven parties argue that any discussion of whether these accounts are properly classified should be addressed as a USOA issue, and that a Joint Board proceeding is not the proper forum for these arguments.[9] Arizona and Bell Atlantic caution that the data we received is suspect and that we should develop an allocation factor using information from 1988 accounting records, rather than the 1987 data, or earlier data, that was used to respond to the *Supplemental NPRM*.

15. Virtually all parties expect a shift in revenue requirement to the state jurisdiction to result from the exclusion of access revenues from the allocation factor. NYNEX and Arkansas argue that additional shifts to the state jurisdiction will occur as a result of other changes in the Separations Manual currently under consideration by this Joint Board. Those parties argue that we should consider the cumulative effect of these other changes. All the states filing comments express concern that the shift in revenue requirement to the state jurisdiction that could result from the exclusion of access revenues would be substantial and would result in upward pressure on local rates. Several parties[10] argue that the stated goal of the Commission and the Joint Board in Docket No. 86-297 was to minimize any potential revenue shifts between the jurisdictions when simplifying and conforming separations procedures to the new USOA.

16. All parties, with the exception of AT&T and MCI, support the interim method of allocation, which includes access revenues in the allocation factor, and the current Part 69 access charge rules, which spread these expenses among the access elements. Many parties concede that a slightly more accurate method of assignment could be developed based on special studies, however, those parties claim that such an approach would be too expensive, too complex, and the difference in resulting revenue requirements would be too small to justify the extra effort and cost. For example, Bell Atlantic maintains that no basis exists for LECs to perform numerous complex special studies since existing procedures are simple to administer and reflect cost-causation principles. Bell Atlantic further argues that we could not develop an allocation procedure that better reflects cost-causation principles because LECs do not have procedures to identify the marketing expenses associated with specific products or services.

17. In its petition for reconsideration, Western Union proposed an allocation factor that would weight access revenues by .25. SWB opposes any weighting, claiming that no factual support for such a contrivance exists and that marketing expense data reveals that this proposal would cause serious cost misallocations. SWB asserts that adopting Western Union's proposal would shift approximately $31 million to the state jurisdiction for SWB's companies.

18. AT&T proposed three alternative allocation approaches in its comments and *ex parte* filings. In a preliminary evaluation of marketing costs, AT&T estimates that the LECs' access related costs in Account 6612, Sales, and Account 6611, Product Management, range from 5 to 10 percent of the total expenses in those accounts. It argues that the access costs in Account 6613, Advertising, are minimal because extensive television and print campaigns are conducted for the LECs' end user services, not for access-related services. In its first *ex parte* presentation, AT&T proposes that if we wish to adopt simplified procedures using billed revenues, we should substantially modify that factor to reflect cost-causation principles. AT&T states that based on the data provided by the LECs and its own analysis, a weighting of approximately .25 will produce an interstate assignment of approximately 5 to 10 percent. AT&T therefore proposes an approach that would allocate marketing expenses on the basis of revenues, excluding common line revenues, while weighting access revenues by .25. SWB, in its second *ex parte* filing, and Pacific in its *ex parte* presentation, argue that no justification exists for AT&T's allocation factor. SWB argues that AT&T's approach would result in a significant shift to the state jurisdiction that would not reflect cost-causation principles. Pacific, in its *ex parte* presentation, argues that no reasonable rationale exists for excluding certain access revenues or for arbitrarily weighting other access revenues.

19. In a second *ex parte* presentation, AT&T revised its position based on a study that it conducted with its employees that interact with the BOCs. AT&T states that its study of the marketing activities performed by the BOCs indicates that an allocation of 4.5 percent would more accurately reflect the actual functions performed than does the current allocation of 28 percent. SWB, in its second *ex parte* filing, argues that AT&T's study is flawed because AT&T employees were asked to give their perception of the BOC's marketing activity associated with interstate access. This perception, SWB argues, results in a bias against activities that are not specifically directed toward the ICs although those activities may actually support access service. In its second *ex parte* filing, SWB provided examples of marketing activities that would benefit access but would not be specifically directed toward ICs. SWB submits that these activities are performed by the premises sales organization and include such activities as: (1) coordination of changes in customer services and connection to the IC's point of presence; (2) sales of interstate access facilities; (3) sales of high capacity service to large customers; and, (4) development of private network proposals. AT&T proposes that we recommend a two-year transition period to phase access revenues out of the allocation factor until that factor reaches approximately 4.5 percent. It suggests that this phase-out be adopted as an

interim measure pending further inquiry. AT&T also suggests that we request detailed LEC studies of the actual expenses incurred in marketing various services. This approach, AT&T states, would be consistent with the approach adopted by the Commission for Account 645, Local Commercial Expense.

20. In its third *ex parte* presentation, AT&T revised its earlier separations proposals and recommended that the expenses in each of the three marketing accounts be assigned to three categories: product management, sales and advertising. The categories would be further divided as follows: (1) expenses in the product management category would be assigned to the access, non-access or common subcategories; (2) expenses in the sales category would be assigned to the IC, end-user, or common subcategories; and, (3) expenses in the advertising category would be assigned to the access, general, other, or common subcategories. For each of the three categories, common expense would be assigned to the other subcategories based on the relative assignment of the expenses to the other subcategories within that category. The various subcategories would be allocated as follows: (1) the access and IC subcategories would be allocated on the basis of access minutes; (2) the end user subcategory would be allocated on the basis of end-user revenues; (3) the general subcategory would be allocated on the basis of minutes-of-use; and, (4) the non-access and other subcategories would be allocated on the basis of non-access revenues. AT&T acknowledges that access revenues could be used instead of access minutes, however it prefers access minutes because of the jurisdictional rate differences that affect access revenues.

21. Several parties recommend that if we change the allocation formula, we should phase in the new formula gradually to reduce the impact on local rates. For example, MCI and AT&T agree that a phase-in of the appropriate allocation factor may be necessary for state regulators to adjust to increased revenue requirements and to provide time to conduct the necessary investigations to ensure that marketing expenses are prudently incurred and properly allocated. West Virginia states that it understands the view that marketing costs primarily enhance state services and that the method of allocating marketing expense should be altered, but requests that the new allocation factor be phased in over a five-year period. Washington maintains that because current regulatory reform proposals contain local rate freeze provisions, shifts in revenue requirement to the state jurisdiction must be sufficiently gradual to allow carriers to meet rate stability commitments. It also argues that the LECs should be allowed the opportunity to offset shifts in revenue requirements with cost reductions or revenue increases, while keeping local rates stable, and that if we alter the allocation factor, we should delay implementation of this change until 1989.

IV. SUMMARY OF DATA

22. The Commission requested each LEC to provide 1987 marketing expense estimates. The following is a summary of the marketing expense data that the Commission received for the 123 study areas that responded to the *Supplemental NPRM*.

1987 Marketing Expense Summary
(Millions)

Unseparated Amounts	
1. Account 6611 (Product Management)	$ 539.9
2. Account 6612 (Sales)	$ 706.0
3. Account 6613 (Product Advertising)	$ 321.3
4. Account 6610 (Marketing) [L1+L2+L3]	$1,567.2
5. Marketing Expense Loadings	$1,373.9
6. Total Revenue Requirement [L4+L5]	$2,941.1
Revenue Requirement Assigned to Interstate	
7. Relative Revenues Including Access Revenues[11]	$ 819.6
8. Relative Revenues Excluding Access Revenues[12]	$ 39.6
9. Shift to State Jurisdiction [L7-L8]	$ 780.0

V. DISCUSSION

23. The comments and data filed in response to the *Supplemental NPRM* [13] do not provide a sufficient basis for us to recommend at this time an appropriate allocation factor for marketing expenses. We therefore request further comment and data on this issue.

24. The Commission's data request asked that the LECs quantify the marketing expenses associated with interstate access service provided to ICs. We find, however, that the data submitted by the LECs regarding the marketing expenses associated with interstate access services is incomplete. The LECs do not quantify the number of people involved in their marketing effort, relying instead on vague terms such as "a number of employees" or "a substantial group of people." Moreover, although the data in Section IV, *supra*, indicates a predicted shift of $780 million in revenue requirements to the state jurisdiction if the Commission adopts an allocation based on relative revenues excluding access revenues, USTA and the LECs had previously estimated that adoption of that factor would produce a revenue requirement shift of $475 million.[14] The parties do not adequately explain that discrepancy.[15] The conversion of expenses from Part 31 accounts to Part 32 accounts could have produced inaccurate estimates. In many cases, expenses assigned to marketing under Part 31 are no longer assigned to marketing under Part 32, which could cause some problems for the carriers in estimating the effect a separations change will have under the new account structure. The record before us at this time is not sufficient to determine whether this is the case.

25. LECs unquestionably direct some marketing activity toward the ICs and do incur expenses for these activities. The LECs, however, have not provided adequate support for these expenses as requested in the *Supplemental NPRM* [16] because they claim that their accounting records do not provide adequate of detail. We believe that these costs should be readily available through job function codes and could have been used by the LECs to support their position. We therefore believe that additional 1987 data[17] is necessary to provide us with the information needed to recommend an allocation factor.[18]

26. In addition to more data, we seek further comment on the allocation procedures which carriers should apply to marketing expenses. As the Commission and this Joint

Board have previously observed, an allocation that reflects cost causation principles is desirable.[19] The adoption of such procedures will ensure that each jurisdiction bears its fair share of the carriers' regulated costs. In many instances, ensuring a fair allocation of regulated costs has required the creation of new separations categories as well as new allocation factors to assign the costs in the new categories.[20] These new categories are often developed to reflect a functional grouping of the various types of costs recorded in the carriers' accounting systems.[21]

27. In furtherance of the objective of developing procedures that best reflect cost-causation principles, and based on the data and comments filed in this proceeding, we have developed a possible alternative approach to the allocation of marketing expenses. Although our proposed plan would apparently result in increased accuracy in separations results, we recognize that it may also depart from the goal of simplification. We therefore request that parties comment on the burdens and cost of implementing this approach. We seek comments and data on a plan that segregates marketing expenses into three functional categories: (1) Product Management, (2) Sales, and, (3) Advertising. These major categories would be further segregated into subcategories based on functional analyses and would be allocated as indicated below:

(1) *Product Management* - Expenses in the Product Management subcategory would be segregated into three subcategories on the basis of a study of work functions.

a. *Toll and Access Product Management* - Expenses in the Toll and Access Product Management subcategory would include only expenses specifically related to toll and access services. Other expenses, such as those incurred for custom calling, Centrex, and local exchange service, would be assigned to the Exchange Product Management subcategory. Expenses in this subcategory would be apportioned on the basis of toll revenue and access revenue, excluding End User Access Revenues.

b. *Exchange Product Management* - Expenses in the Exchange Product Management subcategory would include costs specifically related to exchange services. Expenses in this subcategory would be assigned to the state jurisdiction.

c. *General Product Management* - Expenses in the General Product Management subcategory would include all expenses not included in the Toll and Access Product Management and Exchange Product Management subcategories above. Expenses in the General Product Management subcategory would be apportioned on the basis of the Interstate Toll and Access Product Management expenses divided by the total of the expenses assigned to the Toll and Access Product Management and Exchange Product Management subcategories.

(2) *Sales* - Expenses in the Sales category would be segregated into three subcategories on the basis of a study of work functions.

a. *IC Sales* - Expenses in the IC Sales subcategory would include only those expenses specifically related to sales to ICs. Expenses in this subcategory would be allocated on the basis of billed access revenues excluding End User Access revenues.

b. *End User Sales* - Expenses in the End User Sales subcategory would include only expenses specifically related to sales to end users. Expenses in the End User Sales subcategory would be allocated on the basis of billed revenues excluding Account 5082, Switched Access Revenues.

c. *General Sales* - Expenses in the General Sales subcategory would include all expenses not assigned to the IC Sales and End User Sales subcategories. Expenses in the General Sales subcategory would be apportioned on the basis of the interstate expenses assigned to the IC Sales subcategory and the End User Sales subcategory divided by the total expenses assigned to the IC Sales subcategory and the End User Sales subcategory.

(3) *Advertising* - Expenses in the Advertising category would be segregated into three subcategories based on a functional analysis of the purpose of the promotion.

a. *IC Advertising* - This subcategory would include costs incurred to develop and implement promotional strategies that stimulate the purchase of toll and access services. Only expenses specifically incurred to promote toll or access service would be included in this subcategory. IC Advertising would be allocated on the basis of current billings of Long Distance Message Revenue and Network Access Revenue excluding End User Access Revenues.

b. *Product Advertising* - This subcategory would include costs incurred to develop and implement promotional strategies that stimulate the purchase of specific products and services except toll or access service. Expenses assigned to this subcategory would include expenses for services such as Centrex, local exchange service and custom calling services. Expenses in this subcategory would be apportioned on the basis of current billing, excluding Network Access Revenue.

c. *General Advertising* - This subcategory would include costs incurred to develop and implement promotional strategies that generally stimulate usage but do not advertise any specific product or service. Expenses assigned to this subcategory include all expenses not assigned to the Interexchange Advertising subcategory or the Product Advertising subcategory. Expenses in this subcategory are apportioned among the operations on the basis of total billed revenues.

28. These proposed categories and allocation factors for marketing expenses could further our goal of developing separations procedures that reflect cost causation principles because the categories represent the actual functions we believe the LECs perform in marketing their services. A proposed rule reflecting this proposal is contained in Appendix A.[22] We invite comment on alternative approaches for the allocation and recovery of marketing expenses, including, for example, a general allocation factor, which should be as specific as possible and should

state the justification for any conclusions. We also request that parties address whether the Commission should adopt a special allocation formula for Sales Agency commissions and, if so, what that allocation formula should be. Commenting parties should address the extent to which the procedures proposed: (1) reflect cost-causation principles; (2) affect the existing allocation of revenue requirements between the jurisdictions; and, (3) are simple to implement and administer. These proposals should also include proposed rules that could be used to implement the suggested proposals. Parties are encouraged to suggest alternatives to adapt the proposal described in this Order or other detailed proposals to meet the needs of Class B carriers. Finally, all parties are encouraged to consider and describe the relationship of any proposed separations procedure to the goals of the Communications Act.

V. COMMENTS INVITED

29. Interested parties may file comments and data on the issues discussed herein on or before June 13, 1988, and reply comments on or before July 13, 1988. In accordance with Sections 1.415 and 1.419 of the Commission's Rules,[23] parties must serve an original and five copies on the Secretary of the Federal Communications Commission. Parties must also serve copies on the Joint Board members and staff listed in Appendix D and on the Commission's contractor for public records duplication, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies of the comments will be available for inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

VI. OTHER MATTERS

A. Regulatory Flexibility Act

30. We certify that the Regulatory Flexibility Act[24] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this *Order Inviting Comments and Request for Data* in the Federal Register. As part of our analysis of the proposal described in this *Order Inviting Comments and Request for Data*, however, this Joint Board and the Commission will consider the impact of the proposal on small telephone companies, *i. e.*, those serving 50,000 or fewer access lines.[25] The action proposed herein would have a beneficial economic impact on all such carriers because the proposed rules will result in allocation procedures that better reflect cost-causation principles. These carriers will therefore be able to develop rates that better reflect their actual costs.

B. Paperwork Reduction Act

31. We have analyzed the proposal contained herein with respect to the Paperwork Reduction Act of 1980[26] and have tentatively concluded that it will not, if adopted, impose new or modified information collection requirements on the public. The instant proposal is a general solicitation of comments from the public and as such, does not constitute a collection of information.[27] All comments will be considered in this proceeding. Parties need not specifically respond to the data request for their comments to be considered. Therefore, implementation of the proposed requirements will not be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act.

C. Ex Parte Contacts

32. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the sunshine agenda period.[28] The sunshine agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases a final order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice that the matter has been returned to the staff for further consideration, whichever occurs first.[29] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[30]

33. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision- making personnel which: (1) if written, is not served on the parties to the proceeding; or, (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to to be present.[31] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously- filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates.[32]

34. For Joint Board actions, special *ex parte* rules apply.[33] For those actions, all written materials that are not filed in accordance with a pleading cycle established by this Joint Board shall be accompanied by a Petition for Leave to File showing cause why the material should be considered by this Joint Board. This Joint Board will not consider any filing made outside the authorized pleading cycle and received by the Commission less than fifteen days[34] in advance of a Joint Board meeting at which we will consider the subject matter of that filing. Written *ex parte* presentations, as defined by the Commission's rules, need not be accompanied by a Petition for Leave to File and may be received in the discretion of the Joint Board member or staff personnel involved. No written *exparte* presentations, however, shall be made during the fifteen day period immediately preceding a Joint Board meeting except in response to an inquiry initiated by a member of this Joint Board or our staff.

D. Authorizing Provisions

35. This action is taken pursuant to the provisions of Section 4(i) and (j), 201-205, 221(c), 403 and 410 of the Commission's Act of 1934, as amended, 47 U.S.C.154(i) and (j),201-205, 221(c), 403 and 410.

FOR THE FEDERAL-STATE JOINT BOARD

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] *See* Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules), CC Docket No. 78-196, FCC 86-221, released May 15, 1984, 51 Fed. Reg. 43,498 (December 2, 1986). The revised USOA became effective January 1, 1988 and was codified as Part 32 of the Commission's Rules.

[2] That Joint Board was established in Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, FCC 86-312, released July 8, 1986.

[3] MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board CC Docket Nos. 78-72, 80-286 and 86-297, FCC 87-134, released May 1, 1987, 2 FCC Rcd 2639 (1987) (*Report and Order), petitions for recon. filed*, June 8, 1987. In that decision, certain revisions of the Separations Manual recommended by this Joint Board were adopted by the Commission in addition to the changes recommended by the Joint Board in CC Docket No. 86-297. The new Separations Manual became effective on January 1, 1988 and was codified as Part 36 of the Commission's Rules.

[4] In their petitions for reconsideration, the LECs and USTA estimated that the impact of the exclusion of access revenues from the allocation factor would be a shift of $475 million in revenue requirement to the state jurisdiction.

[5] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 5349 (1987) (*Supplemental NPRM).*

[6] The revised Part 32 USOA established two classes of carriers: Class A companies with annual gross operating revenues of $100 million or more and Class B companies with annual gross operating revenues of less than $100 million. Class B companies are required to maintain a less burdensome level of accounting and system compliance than Class A companies.

[7] The original dates for filing comments and data was September 28, 1987 and the date for filing reply comments was October 13, 1987. In response to a request for an extension of time filed by USTA, the Common Carrier Bureau extended the time for filing comments to October 13, 1987 and the time for filing reply comments to October 28, 1987. MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 5677 (1987). In addition, the Bureau denied a motion for an extension of time for filing reply comments filed by Western Union. MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 6444 (1987). The following parties responded or filed data in this proceeding: American Telephone and Telegraph (AT&T), MCI Communications Corporation (MCI), Ameritech Telephone Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), Cincinnati Bell (Cincinnati), Contel Service Corporation (Contel), GTE Service Corporation and its Telephone Operating Companies (GTE), Mountain States, Northwestern Bell, and Pacific Northwest Bell Telephone Companies (US West), NYNEX Telephone Companies (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southern New England Telephone Company (SNET), Southwestern Bell (SWB), United Telephone System Companies (United), Arizona Corporation Commission (Arizona), Arkansas Public Service Commission (Arkansas), People of the State of California (California), District of Columbia Public Service Commission (DC), State of Florida (Florida), Idaho Public Utility Commission (Idaho), State of Indiana Utility Consumer Counselor (Indiana UCC), Iowa State Utilities Board (Iowa), Public Advocate and Public Utility Commission of Maine (Maine), Maryland Public Service Commission (Maryland), Michigan Public Service Commission (Michigan), Missouri Public Service Commission (Missouri), New Jersey Board of Public Utilities (New Jersey), New York Public Service Commmission (New York), Pennsylvania Public Utility Commission (Pennsylvania), Texas Public Utility Commission (Texas), State of Virginia (Virginia), Washington Utilities and Transportation Commission (Washington), Chairman of the West Virginia Public Service Commission (West Virginia), Wisconsin Public Service Commission (Wisconsin), National Association of Regulatory Utility Commissioners (NARUC), and the United States Telephone Association (USTA). AT&T, SWB, USTA, BellSouth and Pacific filed *ex parte* presentations. In addition, NARUC filed a resolution regarding marketing expenses on November 30, 1987 which we will consider to be an *ex parte* filing. AT&T and Arizona filed motions to accept their late filed comments. Because both parties have shown good cause for filing their pleadings late, we accept those pleadings.

[8] The following parties have provided examples of services provided by LECs which, they argue support access service: NYNEX, New Jersey, Idaho, Missouri, SNET, SWB, Ameritech, Pacific, Mountain States, GTE, Contel, BellSouth, United, Arizona, DC, Maine, and Michigan.

[9] These parties are USTA, Ameritech, GTE, SNET, BellSouth, SWB, in its second *ex parte* filing, and Pacific, in its *ex parte* presentation.

[10] These parties include Arizona, Florida, DC, Missouri, Washington, USTA, NYNEX, and Ameritech.

[11] "Relative Revenues Including Access Revenues" are the revenues derived by using the allocation factor the Commission adopted on an interim basis pending the outcome of this inquiry.

[12] "Relative Revenues Excluding Access Revenues" are the revenues derived by using the allocation factor that the Commission initially adopted in the Part 36 rules.

[13] *See Supplemental NPRM* at Appendix B, Section 4.

[14] *See supra* note 4.

[15] SWB in its second *ex parte* filing maintains that SWB and the LECs have adequately explained this difference. The explanation for the difference, they maintain, is that the original predicted shift in revenue requirements was based on 1985 data, whereas more accurate 1987 data were submitted in response to the *Supplemental NPRM.*

[16] *Supplemental NPRM*, 2 FCC Rcd at 5353.

[17] Arizona and Bell Atlantic have expressed concern that the use of 1987 data will not produce reliable results. However, mapped 1987 data is the most reliable and, for some carriers, the only data that is currently available.

[18] *See* Request for Data at Appendix B.

[19] *See* , *e. g.*, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, FCC 86J-1, released May 7, 1986 (Second Order Inviting Comments on Central Office Equipment), at para. 25.

[20] *See* , *e. g.*, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 2551 (1987) (Consolidating and Reallocating Central Office Equipment Categories).

[21] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 86-5, released January 7, 1986. That decision adopted our recommendation that costs in Account 645 be allocated based on a work function analysis to ensure that the resulting jurisdictional allocation reflects principles of cost causation.

[22] For a diagram of our proposal, see Appendix C.

[23] 47 C.F.R. §1.415 and §1.419.

[24] 5 U.S.C. §601, *et seq.* (1987).

[25] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, the Commission is not required by the terms of that Act to apply the formal procedures set forth therein. The Commission and this Joint Board are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[26] 44 U.S.C. §501.

[27] *See* 5 C.F.R. §1320.7(k)(4).

[28] *See generally* 47 C.F.R. §1.1206(a).

[29] 47 C.F.R. §1.1202(f).

[30] 47 C.F.R. §1.1203.!(

[31] 47 C.F.R. §1.1202(b).

[32] 47 C.F.R. §1206.

[33] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 89 FCC 2d 36 (1982).

[34] In calculating this fifteen day period, neither the day on which the material is filed nor the day on which the Joint Board meeting is scheduled shall be counted.

APPENDIX A

36.372 ***Marketing - Account 6610***

(a) For apportionment purposes, the expenses in this account must be divided into three categories on the basis of functional analysis:

(1) Category 1 - Product Management, Account 6611

(2) Category 2 - Sales, Account 6612

(3) Category 3 - Advertising, Account 6613

(b) Category 1 shall be apportioned as follows:

The expenses in the Product Management category are first segregated into three subcategories based on an analysis of job functions. These subcategories are Toll and Access Product Management, Exchange Product Management and General Product Management.

(i) The Toll and Access Product Management subcategory includes only those costs specifically related to administrative and product management activities related to marketing toll and access services. Expenses in this subcategory are apportioned among the operations on the basis of Account 5100, Long Distance Message Revenue and Account 5080, Network Access Revenue excluding, Account 5081, End User Access Revenues.

(ii) The Exchange Product Management subcategory includes administrative and product management activities specifically related to exchange services. Expenses in this subcategory are directly assigned to the state jurisdiction.

(iii) The General Product Management subcategory includes expenses not assigned to the Access Product Management subcategory or the End User Product Management subcategory. Expenses in this subcategory are apportioned on the basis of the interstate Toll and Access Product Management expenses divided by the total expenses assigned to the Toll and Access Product Management and the Exchange Product Management subcategories.

(c) Category 2 shall be apportioned as follows:

The expenses in the Sales category are first segregated into three subcategories based on an analysis of job functions. These subcategories are Interexchange Carrier Sales, End User Sales, and General Sales.

(i) The Interexchange Carrier Sales subcategory includes only those costs incurred for administrative and sales activities specifically related to marketing services to interexchange carriers. Expenses in this subcategory are apportioned among the operations on the basis of current billing of Account 5080, Network Access Revenue.

(ii) The End User Sales subcategory includes costs incurred for administrative and sales activities specifically related to end users. Expenses in this subcategory are apportioned among the operations on the basis of current billed revenues, excluding Account 5082, Switched Access Revenue.

(iii) The General Sales subcategory includes all expenses not assigned to the Interexchange Carrier Sales subcategory or the End User Sales subcategory above. Expenses in this subcategory are apportioned on the basis of the interstate expenses assigned to the Interexchange Carrier Sales subcategory and the End User Sales subcategory divided by the total expenses assigned to the Interexchange Carrier Sales and the End User Sales subcategories.

(d) Category 3 shall be apportioned as follows:

The expenses in the Advertising category are first segregated into three subcategories on a basis of a functional analysis of the purpose of the promotion. These subcategories are Interexchange Advertising, Product Advertising and General Advertising.

(i) Interexchange Advertising includes costs incurred to develop and implement promotional strategies that stimulate the purchase of products and services related to toll and access services. Expenses assigned to this subcategory will include only those expenses specifically incurred to promote toll or access service. Expenses in this subcategory are apportioned among the operations on the basis of current billing of Account 5100, Long Distance Message Revenue and Account 5080, Network Access Revenues.

(ii) Product Advertising includes costs incurred to develop and implement promotional strategies that stimulate the purchase of products and services excluding toll or access service. Expenses assigned to this subcategory will include expenses for activities such as Centrex, local exchange service and custom calling services. Expenses in this subcategory are apportioned among the operations on the basis of current billed revenues, excluding Account 5080, Network Access Revenue.

(iii) General Advertising includes costs incurred to develop and implement promotional strategies that generally stimulate usage. Expenses assigned to this subcategory include all expenses not assigned to the Interexchange Advertising subcategory or the Product Advertising subcategory. Expenses in this subcategory are apportioned among the operations on the basis of total billed revenues.

Appendix B

VER: 05/04/88

(MKTG.WK1)

FEDERAL COMMUNICATIONS COMMISSION
MARKETING EXPENSES AND OPERATING REVENUES
1987 DATA - ANNUALIZED *
TOTAL STUDY AREA
(UNSEPARATED AMOUNTS)
(USE WHOLE DOLLARS)

##

APPENDIX B - SECTION 1

* USE A REPRESENTATIVE 1987 MONTH MULTIPLIED BY 12. IF 1987 MONTHLY DATA IS NOT AVAILABLE, USE REPRESENTATIVE QUARTERLY OR SEMI-ANNUAL DATA, ANNUALIZED.

FILE RENAMING INSTRUCTIONS:

TO INSURE ACCURACY IN SUMMATION OF THE DATA, PLEASE CHANGE THE CURRENT FILE NAME (MKTG.WK1) TO AN EIGHT (8) CHARACTER FILE NAME WHERE THE FIRST TWO CHARACTERS ARE THE INITIALS OF THE COMPANY NAME, THE SECOND TWO CHARACTERS ARE THE INITIALS OF THE STUDY AREA, AND THE REMAINING 4 CHARACTERS ARE "MKTG". THEREFORE, AN EXAMPLE FILE NAME FOR BELL ATLANTIC'S PENNSYLVANIA STUDY AREA WILL BE "BAPAMKTG.WK1".

NOTE: DO NOT ADD OR DELETE COLUMNS OR ROWS OR MAKE ANY CHANGES IN THE WORKSHEET. ANY COMMENTS CAN BE ADDED TO THE FOOTNOTE SECTION AT THE END OF THE WORKSHEET.

****

MAILING ADDRESS:

_____

_____

_____

_____

_____

CONTACT PERSON:

_____

TELEPHONE NUMBER:

_____

COMPANY FILING DATA ----------

STUDY AREA ----------

STUDY AREA CODE ----------

MO. & YR. OR PERIOD USED TO ANNUALIZE DATA ----------

##

APPENDIX B - SECTION 2

-PART 31 ACCOUNTS (UNSEPARATED AMOUNTS)-

A1. 640 - GEN COMMERCIAL ADMIN EXPENSE ----------

A2. 642 - ADVERTISING EXPENSE ----------

A3. 643 - SALES EXPENSE ----------

A4. 645 - LOCAL COMMERCIAL EXPENSE ----------

A5. ___-_____ * ----------

* INSERT ACCOUNT NUMBER AND AMOUNT FOR ALL OTHER AND EXPLAIN IN FOOTNOTE SECTION.

-PART 32 ACCOUNTS (UNSEPARATED AMOUNTS)-

ENTER THE PORTION OF THE PART 31 EXPENSES LISTED ABOVE (A1 - A5) THAT WOULD BE CHARGED TO THE CORRESPONDING PART 32 ACCTS LISTED BELOW (B1 - B6).

B1. TOTAL - 6611 - PROD MGMT EXPENSE 0

a. 6611 - PROD MGMT EXP (ASSOCIATED WITH A1) ----------

b. 6611 - PROD MGMT EXP (ASSOCIATED WITH A5) ----------

B2. TOTAL - 6612 - SALES EXPENSE 0

a. 6612 - SALES EXPENSE (ASSOCIATED WITH A1) ----------

b. 6612 - SALES EXPENSE (ASSOCIATED WITH A3) ----------

c. 6612 - SALES EXPENSE (ASSOCIATED WITH A4) ----------

d. 6612 - SALES EXPENSE (ASSOCIATED WITH A5) ----------

B3.	TOTAL - 6613 - PROD ADV EXP	0
	a. 6613 - PROD ADV EXP (ASSOCIATED WITH A2)	----------
	b. 6613 - PROD ADV EXP (ASSOCIATED WITH A5)	----------
B4.	TOTAL - 6611 - PRODUCT MGMT EXPENSE	0
	a. TOLL AND ACCESS	0
	1. INTEREXCHANGE CARRIER	----------
	2. END USER	----------
	b. END USER	0
	1. BUSINESS	----------
	2. RESIDENCE	----------
	3. OTHER	----------
	c. GENERAL	----------
B5.	TOTAL - 6612 - SALES EXPENSE	0
	a. INTEREXCHANGE CARRIER	----------
	b. END USER	0
	1. BUSINESS	----------
	2. RESIDENCE	----------
	3. OTHER	----------
	c. GENERAL	----------
B6.	TOTAL - 6613 - PRODUCT ADVERTISING EXPENSE	0
	a. INTEREXCHANGE ADVERTISING	----------
	b. PRODUCT SPECIFIC ADVERTISING	----------
	c. GENERAL ADVERTISING EXPENSE	----------
B7.	NET RETURN ON MARKETING PLANT INVESTMENT *	----------
	* NET RETURN = INVESTMENT SPECIFICALLY RELATED TO MARKETING ACTIVITY, LESS RESERVES, TIMES THE AUTHORIZED RATE OF RETURN (PLUS ADJUSTMENT FOR IDC AND ITC, IF APPLICABLE).	
B8.	OTHER OVERHEAD (FIT, SIT & OTHER INDIRECT EXPENSES AND TAXES WHICH WOULD BE ALLOCATED INDIRECTLY BY PART 36 AS A RESULT OF THE MARKETING EXPENSE ALLOCATION. USE THE STATUTORY TAX RATE FOR THE DATA SUBMITTED).	----------
B9.	TOTAL REVENUE REQUIREMENT (MARKETING) (SUM OF LINES B4 THRU B9 TOTALS)	0

APPENDIX B - SECTION 3

-PART 31 OPERATING REVENUE ACCOUNTS
(BILLED REVENUES AS DEFINED IN PARTS 36/67)

C1. 500-506 - LOCAL SVC REV ----------

C2. 510-516 - INTERST TOLL REV ----------

C3. 510-516 - STATE TOLL REV ----------

C4. 508-509 - TOTAL ACCESS REV 0
a. 508 - TOTAL INTERST ACCESS REV 0
1. 508.1 - INTERST-SLC ----------
2. 508.2(a) - INTERST-CCL ----------
3. 508.2(b) - INTERST-SWITCHED ----------
4. 508.3 - INTERST-SPECIAL ----------
b. 509 - TOTAL STATE ACCESS REV ----------

C5. 520-526 - TOTAL OTHER MISC REV 0
a. INTERST - OTHER MISC REV ----------
b. STATE - OTHER MISC REV ----------

C6. 527-528 - TOTAL B&C REV 0
a. INTERST - BILLING AND COLLECTION REV ----------
b. STATE - BILLING AND COLLECTION REV ----------

C7. TOTAL OPERATING REVENUES 0
(SUM OF LINES C1 THRU C6 TOTALS)

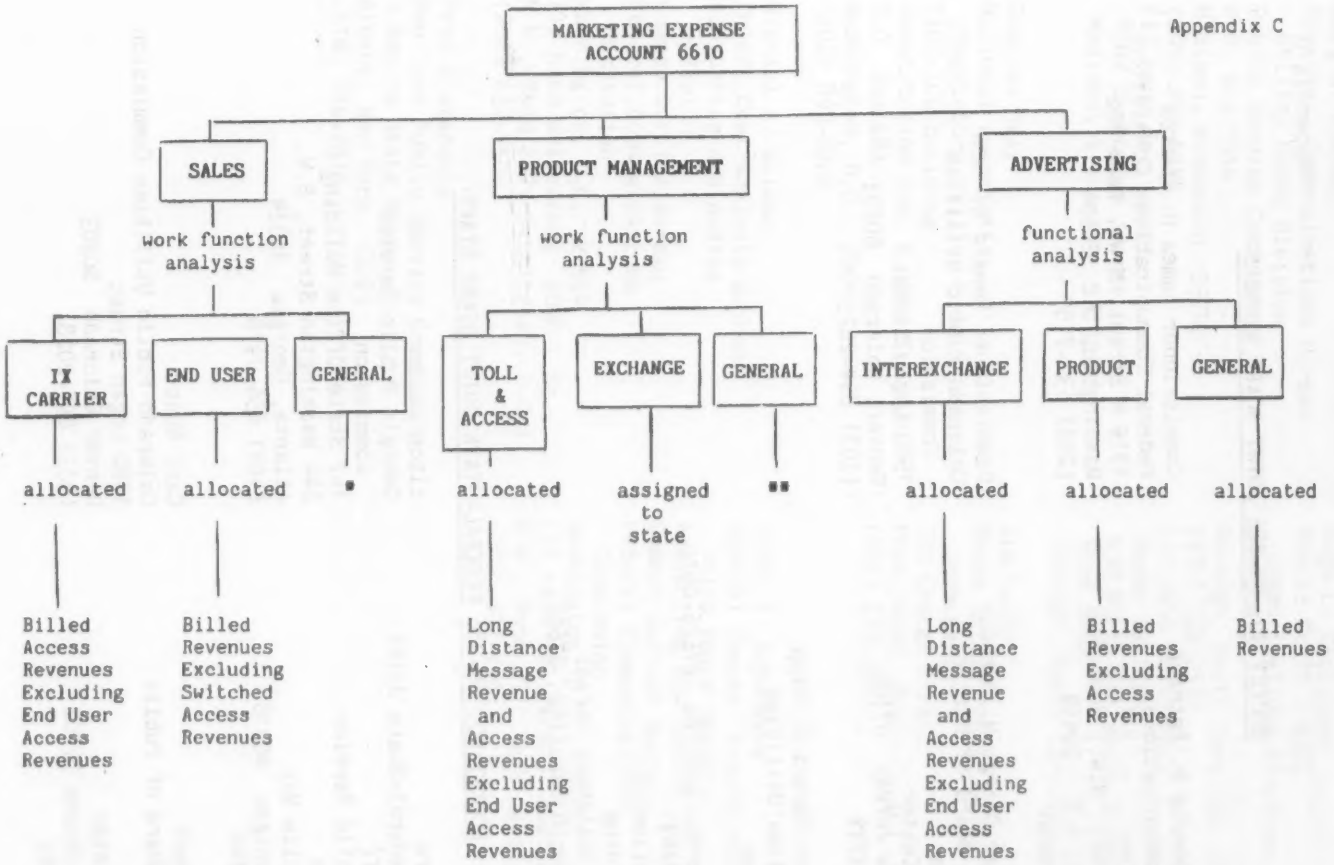
##########

APPENDIX B - SECTION 4

D1. SALES AGENCY COMMISSIONS
a. 1987 SALES AGENCY COMMISSIONS-TOTAL _____
b. 1987 SALES AGENCY COMMISSIONS ASSIGNED TO INTERST _____

FOOTNOTE SECTION:

Appendix C



* Expenses in this General subcategory are apportioned on the basis of the interstate expenses in the IX Carrier and End User subcategories divided by the total expenses in those subcategories.

** Expenses in this General subcategory are apportioned on the basis of the interstate expense in the Toll and Access subcategory divided by the total expense in the Toll and Access and the Exchange subcategories.

Appendix D

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Diane Hockman
Ohio Public Utilities Commission
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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-195

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Onawa, Iowa and Vermillion, South Dakota)	RM-5810

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 6, 1988; Released: May 17, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Barnco (petitioner) requesting the substitution of Channel 272C1 for Channel 272A at Onawa, Iowa, and the modification of its permit for Station KOOO to specify the higher powered channel. Petitioner also requests that an Order to Show Cause be issued to Vermillion Radio, Inc. to demonstrate why its license for Station KVRF, Vermillion, South Dakota, should not be modified from its present Channel 272A to Channel 230A. Vermillion and Onawa are located 108 kilometers apart while the Commission's Rules require a 196 kilometer separation between co-channel Class A and C1 allotments. Petitioner states that it will apply for the channel at Onawa, if allocated. It also states that it will reimburse Vermillion Radio, Inc. for all reasonable expenses incurred in connection with its change of channel.

2. Channel 272C1 can be allocated to Onawa in compliance with the Commission's minimum distance separation requirements and can be used at Station KOOO's present transmiter site.[1] However, the allocation of Channel 230A at Vermillion conflicts with a pending request filed by Tri-State Broadcasters, Inc. requesting the substitution of Channel 230C2 for Channel 232A at Sioux Center, Iowa (RM-5978). In an effort to negate this conflict, the staff conducted a channel search and found that Channel 292A could be allocated to Vermillion in compliance with the Commission's technical requirements and could be used at Station KVRF's transmitter site.[2] Therefore, we have modified petitioner's proposal to the extent of substituting for consideration herein the allocation of Channel 292A at Vermillion.

3. As requested, we shall also propose to modify the permit of Station KOOO to specify operation on Channel 272C1 at Onawa, Iowa. Pursuant to the Commission's Rules, no other expressions of interest in use of Channel 272C1 at Onawa or 292A at Vermillion will be entertained. *See Modification of FM and TV Station Licenses*, 51 FR 20290, June 4, 1986, and Section 1.420(g) of the Commission's Rules.

4. We believe the public interest would be served by proposing the substitution of Channel 292A for Channel 272A at Vermillion, South Dakota and the substitution of Channel 272C1 for Channel 272A at Onawa, Iowa, since it could enable Onawa to receive its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Onawa, Iowa	272A	272C1
Vermillion, South Dakota	272A	292A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Vermillion Radio, Inc., licensee of Station KVRF, Vermillion, SD, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 292A as proposed herein instead of its present Channel 272A.

6. Pursuant to Section 1.87 of the Commission's Rules, Vermillion Radio, Inc. may, not later than **July 7, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Vermillion Radio to furnish additional information. If Vermillion Radio raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Vermillion Radio will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KVRF, as follows: Vermillion Radio, Inc., P.O. Box 282, Vermillion, South Dakota 57069.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **July 7, 1988,** and reply comments on or before **July 22, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William M. Barnard, Esq.
Mark Van Bergh, Esq.
Kenkel, Barnard & Edmundson
1220 19th Street, N.W., Suite 202
Washington, D.C. 20036
(Counsel to petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* Certification *That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for 272C1 at Onawa are North Latitude 42-01-41 and West Longitude 96-11-11.

[2] The coordinates for Channel 292A at Vermillion are North Latitude 42-47- 32 and West Longitude 97-00-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-196

In the Matter of

Amendment of Section 73.202(b), RM-6212
Table of Allotments,
FM Broadcast Stations.
(Haltom City, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1988 **Released: May 17, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Bluebonnet Radio Broadcasters, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 227C2 to Haltom City, Texas, as that community's first FM service. Petitioner filed information in support of its proposal and states an intention to pursue the allotment, if authorized.

2. Channel 227C2 can be allocated to Haltom City, Texas, in compliance with the Commission's minimum spacing requirements with a site restriction of 8.8 kilometers (5.5 miles) north of the community.[1] The restriction is necessary in order to avoid a short spacing to Station KBTS- FM, Channel 227C at Killeen, Texas.

3. In view of the fact that Haltom City, Texas, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Haltom City, Texas	—	227C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 7, 1988,** and reply comments on or before **July 22, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry C. Martin, Esquire
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the restricted site are 32-52-38 and 97-14-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-197

In the Matter of

Amendment of Section 73.202(b), RM-6297
Table of Allotments,
FM Broadcast Stations.
(Crockett, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1988 **Released: May 17, 1988**

By the Deputy Chief, Policy and Rules Division:

1. At the request of James H. Gibbs, d/b/a Pioneer Broadcasting, (petitioner), licensee of Station KIVY-FM, Channel 224A, Crockett, Texas, the Commission considers herein a petition for rule making seeking the substitution of Channel 224C2 for Channel 224A and modification of its license to specify operation on the higher class co-channel. Petitioner provided information in support of its proposal for expanded service at Crockett.

2. The substitution can be made consistent with the Commission's minimum separation requirements at the petitioner's current transmitter site.[1]

3. As requested, we shall propose to modify the license of Station KIVY-FM to specify operation on the higher class co-channel, Channel 224C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Crockett.

4. Accordingly, in order to provide Crockett with its second wide coverage area FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Crockett, Texas	224A, 228A	224C2, 228C2[2]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 7, 1988,** and reply comments on or before **July 22, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Stanley G. Emert, Jr., Esquire
Watson, Erickson & Emert
Suite 2108, Plaza Tower
Post Office Box 131
Knoxville, TN 37901
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The site coordinates are 31-18-20 and 95-27-06.

[2] In a separate proceeding the Commission has proposed the substitution of Channel 228C2 for Channel 228A at Crockett, as that community's first wide coverage area FM service. *See* MM Docket No. 87-383, 2 FCC Rcd 5862 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-434

In the Matter of

Amendment of Section 73.202(b),	RM-6021
Table of Allotments,	RM-6191
FM Broadcast Stations.	RM-6192
(Scranton and Surfside Beach, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1988; Released: May 17, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Jones, Eastern of the Grand Strand, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6331 (1987), proposing the substitution of Channel 276C2 for Channel 276A at Surfside Beach, South Carolina, and the modification of its license for Station WYAK-FM to specify the higher powered channel. Petitioner filed comments reiterating its support for the Surfside Beach allotment. In addition, Broadcasting of Scranton (Broadcasting) and Scranton Communications (Communications) filed counterproposals requesting the allotment of Channel 275A to Scranton, South Carolina, as the community's first local FM service, to which petitioner responded in reply comments.[2,3] Scranton Communications' counterproposal also proposed the allotment of Channel 300C2 to Surfside Beach for use by petitioner's Station WYAK-FM.

2. Broadcasting states that Scranton is an incorporated city in Florence County, with a 1980 U.S. Census population of 861 persons. It states that Scranton is governed by a mayor and city council and that it has its own police and fire departments. Further, it contends that it has the "usual complement" of commercial activity and community organizations for a town of its size. Noting its small population, Broadcasting points out that the Commission has allotted channels to communities which have lesser populations than Scranton, citing *Bluffton, South Carolina*, in which the Commission allotted a channel to a community with a population of 451 persons. It further asserts that the competing community of Surfside Beach is also small, with only 2,522 persons. Citing *Cookeville, Tennessee, et al.*, 1 FCC Rcd 53 (1986), Broadcasting contends that, insofar as possible, the Commission consistently seeks to provide each community with its own local service. Thus, it argues that the public interest will be better served by allotting Channel 275A to Scranton than by upgrading the existing station at Surfside Beach.

3. Communications notes that Surfside Beach currently receives local aural service from co-owned Stations WYAK-FM and WYAK(AM). Like Broadcasting, Communications also asserts that the allotment of a first local aural service to Scranton, as opposed to the upgrading of Surfside Beach's second local aural service, would better serve the public interest. In support, it cites *Revision of FM Assignment Policies and Procedures (Revision)*, 90 FCC 2d 88, 51 R.R. 2d 807 (1982). However, it contends that both parties can be accommodated if Channel 300C2 is substituted for Channel 276A at Surfside Beach. Communications asserts that the license of Station WYAK-FM can automatically be modified to Channel 300C2 if no other expressions of interest in use of the channel are expressed, citing *FM License Upgrading*, 61 R.R. 2d 114 (1986). Communications provides an engineering study demonstrating that Channel 300C2 can be allotted to Surfside Beach in compliance with the Commission's minimum distance separation requirements if Channel 299A is not allotted to Fairbluff, North Carolina. Communications points out that the Commission denied the request of Marine Broadcasting Corporation, the proponent of the Fairbluff allotment, based on a finding that it had not made a showing sufficient to warrant the substitution of a Docket 84-231 allotment and that an appeal to the United States Court of Appeals for the District of Columbia Circuit is now pending. However, even if Channel 299A is allotted to Fairbluff, Communications states that there is ample land area to locate a transmitter to serve Surfside Beach on Channel 300C2.

4. Petitioner asserts that the proposed upgrade of Station WYAK-FM to Channel 276C2 must prevail over the counterproposals seeking the allotment of Channel 275A to Scranton. While not questioning Scranton's status as a community for allotment purposes, it argues that the community is nothing more than a "quiet village," citing *Deborah B. Carrigan*, 100 FCC 2d 721 (Rev. Bd. 1985), rev. denied 104 FCC 2d 826 (1986). In addition, petitioner contends that neither counterproponent has made any showing as to why Scranton should receive a Section 307(b) preference beyond stating that the allotment would provide Scranton with its first local service. Petitioner states that the Commission has been asked before to make a choice between a first service and additional service to competing communities of disparate population. It states that a similar comparison arose in *Ruarch Associates*, 101 FCC 2d 1358 (1985), where the Commission had to decide whether Edinburg, Virginia, with a population of 752 persons, should be granted its first local service, or whether Woodstock, Virginia, with a population of 2,627 persons, should be granted its second service. In deciding in favor of Woodstock, petitioner cites the following rationale:

> "Since each community of appreciable size is presumed to need at least one station for local service self expression, Edinburg with no licensed transmission service would presumptively have a greater need for service than Woodstock. However, we have never found that a community as small as Edinburg is appreciable enough to take advantage of this presumption in a multiple party proceeding. Moreover, the presumption in favor of a first local transmission service does not result in an automatic 307(b) preference."

Reply Comments at 3. Petitioner concludes that it is clear that Scranton is too small to be entitled to a 307(b) preference, citing *Ruarch Associates*, *supra*, and *Beacon Broadcasting*, 2 FCC Rcd 7562 (1987).

DISCUSSION

5. Petitioner does not question Scranton's status as a community. However, it argues that Scranton should be considered a "quiet village" and thus not given a Section 307(b) preference, contending that the situation here is analogous to those in *Carrigan*, *Ruarch* and *Beacon*, *supra*. We disagree. The Commission has described the "quiet village" situation as follows:

> The "Quiet Village Model" Situated somewhere between the "traditional model" and the "suburbanite model" are the even rarer samples exemplified by our recent decisions in Ruarch Associates, 56 RR 2d 1593 (Rev. Bd. 1984) and Santee Cooper Broadcasting Co., 57 RR 2d 662 (Rev. Bd. 1984). Although finding that certain applicants in both cases had established that the exceedingly small communities without aural transmission outlets they had specified in their applications were, at least, 'identifiable communities' (as that term is used by the Commission), no measurable Section 307(b) preferences were due those applicants, in part, because (1) the signals of any and all of the applicants would cover both competing communities; and (2) the larger competing communities had shown a far greater public interest need for a first *competitive* aural service than the fractionally smaller communities (population under 1000 in both cases) had shown for a first aural transmission service.

Debra D. Carrigan, 58 R.R. 2d 96, at 104 (1985) (footnote omitted). Petitioner appears to believe that in situations where a conflict exists between a community of less than 1,000 population and a larger community, the smaller community must be found to be a "quiet village" and thus not given a Section 307(b) preference. However, in the "quiet village" cases, two additional circumstances are often present. One, the communities are situated close enough so that service can be provided to both communities regardless of where the channel is allotted, and two, the larger community seeks the allotment in order to provide a first competitive outlet. Here, the only similarity is the fact that Scranton has a population of less than 1,000 persons. Unlike *Carrigan* and *Ruarch*, *supra*, the allotment of the requested channel to either community could not provide service to the other. Surfside Beach and Scranton are located approximately 75 kilometers apart but the 70 dBu signal of a Class C2 station extends only about 33 kilometers. In addition, unlike *Carrigan*, *Ruarch* and *Beacon*, the allotment of Channel 276C2 to Surfside Beach would not provide the community with a first competitive service but rather would merely enhance the service already provided by Station WYAK-FM. Finally, Scranton appears to be a growing community and is presently smaller than Surfside Beach by only a factor of approximately three.[4] Therefore, although the population differential between Scranton and Surfside Beach is similar to the population differential between the smaller and larger communities in *Ruarch* and *Beacon*, we believe that the petitioner has not shown that the public interest benefits accruing from the rebuttal of the presumption of greater need for a first local service at Scranton are substantially the same as those in *Ruarch* and *Beacon*, *supra*. Based on the above discussion, the competing requests to allot Channel 275A to Scranton, as its first local service, and the upgrading of Station WYAK-FM to Channel 276C2 at Surfside Beach will not be considered within the context of the "quiet village" rulings. Further, we have conducted a channel search and found that there are no alternative channels available for Scranton or Surfside Beach.[5]

6. In *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), the Commission set forth the following allotment priorities:

> (1) First fulltime aural service;
> (2) Second aural service;
> (3) First local service;
> (4) Other public interest matters.
> [Co-equal weight given to priorities (2) and (3)]

The allotment of Channel 276C2 would not fulfill any of the first three priorities since no showing of first fulltime or second aural service was provided by the petitioner and Surfside Beach receives local service from Stations WYAK-AM and WYAK-FM. Thus, the allotment of Channel 276C2 can only be considered in the context of priority (4), other public interest matters. On the other hand, while the allotment of Channel 275A to Scranton also appears not to provide either a first fulltime or second aural service to any area, it would provide the community with its first local service, thus furthering priority (3). As stated earlier, petitioner does not dispute that Scranton is a community for allotment purposes. Therefore, based upon the totality of the evidence, we believe that the public interest would be served by allotting Channel 275A to Scranton since an interest has been expressed in providing the community with its first local service.

7. Channel 275A can be allotted to Scranton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 1, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Scranton, South Carolina	275A

8. The window period for filing applications will open on **July 5, 1988,** and close on **August 4, 1988.**

9. IT IS FURTHER ORDERED, That the request of Jones, Eastern of the Grand Strand, Inc. to substitute Channel 276C2 for Channel 276A at Surfside Beach, South Carolina, and modify its license for Station WYAK-FM to specify the higher powered channel, IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Scranton, South Carolina, has been added to the caption.

[2] Public Notice of the filing of the counterproposals was given on December 28, 1987, Report No. 1702.

[3] In response to petitioner's reply comments, Scranton Communications filed a "Response to Reply Comments" to which the petitioner filed a "Motion to Dismiss or Strike Response to Reply Comments." We find that the unauthorized further pleading by Scranton Communications has provided no information of decisional significance. Therefore, its "Response" will not be accepted and petitioner's "Motion to Dismiss" will be granted.

[4] *See 1988 Rand McNally Commercial Atlas.*

[5] Petitioner did not respond to Scranton Communication's proposal that Channel 300C2 be allotted to Surfside Beach. We note, however, that the allotment of Channel 300C2 would require Station WYAK-FM to move its transmitter site since use of the channel at its present site would conflict with the request of Marine Broadcasting Company to substitute Channel 299A for Channel 287A, which was allotted to Fairbluff, North Carolina, in MM Docket 84-231. The Commission's earlier denial of this request is now before the Court of Appeals for the D.C. Circuit in *James Reeder v.* FCC & USA, Case No. 86-1045.

[6] The coordinates for this allotment are North Latitude 33-55-06 and West Longitude 79-44-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-198

In the Matter of

Amendment of Section 73.202(b), RM-6313
Table of Allotments,
FM Broadcast Stations.
(Harbeck-Fruitdale, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1988; Released: May 17, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Carl Wilson (petitioner), proposing the allocation of Channel 252A to Harbeck-Fruitdale, Oregon, as the community's first local FM service. Petitioner states that he will apply for the channel, if allocated. Channel 252A can be allocated to Harbeck-Fruitdale in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allocation of Channel 252A to Harbeck-Fruitdale, Oregon, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Harbeck-Fruitdale, Oregon	–	252A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **July 7, 1988,** and reply comments on or before **July 22, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Carl Wilson
778 N.W. 4th Street
Suite 4
Grants Pass, Oregon 97526
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* Certification *That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-24-53 and West Longitude 123-19-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of General Electric Company, GE Subsidiary, Inc. 21, and MCI Communications Corporation for Authority to Transfer Control of RCA Global Communications, Inc.

File No. ENF-88-1

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1988; Released: May 16, 1988

By the Chief, Common Carrier Bureau:

1. Before the Bureau is an application filed by General Electric Company (GE), GE Subsidiary, Inc. 21 (GE 21) and MCI Communications Corporation (MCI) (collectively referred to herein as the Applicants) pursuant to sections 212, 214 and 310(d) of the Communications Act (the Act), 47 U.S.C. §§ 212, 214 and 310(d),[1] section 1 of the Submarine Cable Landing Act, 47 U.S.C. § 34,[2] and Parts 1, 62 and 63 of the Commission rules. [3] Applicants seek approval to transfer control of RCA Global Communications, Inc. (RCA Globcom) from GE to MCI.[4] The application includes requests for approval of interlocking carrier directorates and for transfer of control of authorizations to acquire and operate interstate and international communications lines.[5] It provides that MCI will acquire all of the stock of GE 21 (RCA Globcom's parent company) and certain assets, contracts and leases of G.E. affiliates for approximately $160 million.[6] The Applicants contend that grant of the instant application will improve the quality and breadth of services offered by RCA Globcom and MCI, enhance their ability to compete, decrease the cost of their operations, and increase the efficiency of such operations. For the reasons discussed below, we conclude that transfer of the subject authorizations and licenses will serve the public interest, convenience, and necessity, and, accordingly, we grant the application.

I. BACKGROUND AND CONTENTIONS

A. *The Applicants*

2. GE is engaged in developing, manufacturing and marketing a wide variety of products for the generation, transmission, distribution, control and utilization of electricity and products and services developed from the application of related and new technologies. Through wholly- owned, nonconsolidated affiliate and its two wholly-owned subsidiaries, GE also offers a broad spectrum of financial services, including distribution sales financing, commercial and industrial financing, real estate and reinsurance. In addition, GE has majority or minority interests in a number of companies engaged primarily in manufacturing and distributing products and services outside the United States similar to those sold domestically. GE owns, through other subsidiaries, the licenses for 13 television and radio stations in the United States, the NBC television network and the common carrier communications and non-communications activities formerly carried on by RCA Corporation and certain of its subsidiaries. GE 21, a wholly-owned subsidiary of GE, exists solely as a holding company for RCA Globcom. It holds all of RCA Globcom's outstanding stock.

3. MCI is a Delaware corporation whose principal place of business is in the District of Columbia. It is the corporate parent of MCI Telecommunications Corporation, MCI International Telecommunications Corporation, Western Union International, Inc., and Satellite Business Systems, each of which is a communications common carrier serving interstate and/or international markets.

4. RCA Globcom is a common carrier offering primarily domestic and international telex, leased private line channels, data and facsimile transmission services. RCA Globcom provides domestic communications services within the U.S. and international communications services between the United States and over 200 other countries. The company uses both undersea cable facilities, jointly owned by the company with other U.S. and foreign carriers, and Intelsat satellite facilities, leased from the Communications Satellite Corporation (Comsat). RCA Globcom owns interests in two satellite earth stations operating with the Intelsat satellites and, together with Comsat and other international earth station users, is also part of the U.S. Earth Station Ownership Committee (ESOC).[7]

B. *The Application*

5. The Applicants seek authority to transfer control of all Commission authorizations held by RCA Globcom from GE to MCI, including licenses for common carrier radio facilities, section 214 authorizations and submarine cable landing licenses. To permit MCI, RCA Globcom and other common carrier subsidiaries and affiliates owned or controlled by MCI to share directors and officers, the Applicants also seek a ruling pursuant to section 212 of the Act and Part 62 of the Commission's rules that, after the acquisition, the following companies will be commonly owned by MCI: MCI Telecommunications Corporation, MCI International, Inc., MCI International Telecommunications Corporation, Western Union International, Inc., Satellite Business Systems, and RCA Globcom.

6. The Applicants contend that permitting MCI to assume control of RCA Globcom will serve the public interest by strengthening the competitive position of these companies, both domestically and internationally. They note that RCA Globcom and MCI's international record communications carrier, Western Union International, Inc. (WUI), now face direct competition in the provision of telex, data, private line, facsimile and other communications services in the United States and abroad from a growing range of large, well-capitalized companies. Competitors include AT&T, Contel, GTE, Comsat, Federal Express, Western Union/ITT,[8] TRT Telecommunications and FTC Communications. The Applicants further note that a major regional Bell operating company, NYNEX, has an option to acquire Private Transatlantic Telecommunications System, Inc. (PTAT, formerly known as Tel-Optik, Ltd.), which will own a one-half interest in a transatlantic fiber optic cable system between the United States and Great Britain.[9] Foreign-owned or controlled companies, including British Telcom and Italcable, also compete directly or through U.S. subsidiaries with these companies on routes to some countries. The Applicants

contend that, in view of the large number of existing, well-positioned and well-financed competitors in international non-IMTS markets, MCI will remain a nondominant carrier in those markets after its acquisition of RCA Globcom.[10]

7. According to the Applicants, to compete effectively in today's telecommunications marketplaces, carriers are required to offer a wide array of innovative, high-quality, reliable transmission services and provide such services to a broad range of domestic and international geographic markets. They contend that the acquisition of RCA Globcom by MCI will substantially advance the efforts of both companies to meet these marketplace requirements. In addition, the Applicants assert that certain efficiencies can be expected to lower the operating costs of both companies, allowing them to offer services at competitive rates. As such, according to the Applicants, grant of the instant application will further the Commission's efforts in recent years to foster increased competition in international telecommunications marketplaces.

8. The Applicants state that MCI's international strategy has concentrated on the objectives of efficient, cost-effective voice services and flexible, full-function data services. The acquisition of WUI in 1982 provided MCI's initial entry in this market through its telex and leased line activities serving the world with a basic messaging capability. Since that time, MCI's international operations have grown and expanded into international voice, sophisticated data and worldwide telecommunications systems, such as MCI Mail service. In turn, according to the Applicants, the public has benefited through lower rates for more innovative and sophisticated voice and data services. They contend that the acquisition of RCA Globcom will enhance MCI's competitive position in worldwide messaging and data services; that RCA Globcom will be spurred to provide even better and lower-cost services to the public; and that because MCI's only business is information transfer, the public should benefit from MCI's more focused concentration on the needs of telecommunications users.

C. *Petitioners*

9. The Teamsters allege that if MCI's acquisition of RCA were approved, MCI would have a 50 percent share of the non-IMTS market. In light of the recently authorized merger of Western Union and ITT Worldcom, the Teamsters contend that the proposed acquisition would radically transform the international record carrier (IRC) industry from one in which no carrier controlled as much as 30 percent of the market a few months ago to an oligopoly in which two carriers control 85 percent of the market.[11] In urging denial of the application or its designation for further proceedings, the Teamsters rely on their interpretation of the merger guidelines of the Department of Justice (Department Guidelines),[12] particularly the Herfindahl-Hirschman Index (HHI).[13] According to the Teamsters, the proposed acquisition should not be authorized because it would result in an unjustified increase in market concentration, regardless of whether the merger is analyzed on a market-by-market, selected-markets, or an aggregate-market basis.

10. Extrapolating from 1985 revenue data for international telex, telegraph and private line services reported by certain regulated carriers to the Commission, the Teamsters contend that the total non-IMTS market shares of RCA Globcom, ITT Worldcom, WUI, TRT, Western Union, and FTC at that time were 29.74%, 28.43%, 19.54%, 10.75%, 6.75%, and 3.43%, respectively, and that the HHI was 2249. The Teamsters state that the HHI rises to 2633 assuming consummation of the authorized merger of ITT Worldcom and Western Union. The Teamsters further state that if the proposed merger of RCA Globcom also is approved, the HHI would increase to 3795, based again on the same 1985 data. MCI's affiliates, RCA Globcom and WUI, would have a 49.28% share of the market.[14] Extrapolating from 1986 revenue data reported to the Commission for international telex and telegraph services, the Teamsters contend that the total non-IMTS market will rise to an unacceptably high level of concentration in each of ten selected large geographic markets if the proposed acquisition is approved and that RCA Globcom/WUI and ITT Worldcom/Western Union would have an even larger combined share of the non-IMTS market in six of the markets (*i. e.*, Germany, Brazil, Japan, Hong Kong, Taiwan and Australia) than the 84.46% share it calculated based on industry-wide figures. According to the Teamsters' HHI analysis, if the proposed acquisition is effected, the Justice Department merger guidelines "extraordinary circumstances" threshold would be met in all but 12 of 189 geographic markets.[15]

11. In its petition to deny, TRT, one of RCA Globcom's competitors, contends that approval of the proposed acquisition would be inconsistent with the Commission's responsibilities under the Record Carrier Competition Act of 1981, *i. e.*, section 222(b)(1) of the Communications Act. That statute provides as follows:

> The Commission shall, to the maximum extent feasible, promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition. In order to meet the purposes of this section, the Commission shall forbear from exercising its authority under this Act as the development of competition among record carriers reduces the degree of regulation necessary to protect the public.[16]

12. TRT initially notes that the approval of the Western Union/ITT Worldcom merger involved unopposed applications that were granted to prevent the imminent financial collapse of Western Union. It states that, in contrast, the instant application does not involve a failing company, and there is no claim that the proposed acquisition is necessary for the financial survival of either MCI or RCA Globcom. TRT contends that the intended result of the acquisition would be the loss to the public of RCA Globcom as a competitor providing international record communications services[17] and dominance by Western Union and MCI of both the non-IMTS and international record communications markets.[18]

13. TRT further contends that over 85 percent of total international telex revenues would be received by Western Union and MCI if the latter acquired RCA Globcom[19] and expresses concern that their future activities might include predatory actions to stifle competition by TRT.[20] While noting that the antitrust laws may be available should such acts occur, TRT notes that these laws involve lengthy and difficult proceedings with uncertain remedies. TRT contends that the Commission should prevent the establishment of an industry structure which has the potential for

anticompetitive abuses and that the Commission should not rely solely on enforcement of antitrust laws to assure fair competition in the industries that it regulates.[21]

14. ITT Worldcom does not object to the combined ownership of RCA Globcom and WUI, whether merged or not, by MCI. ITT Worldcom states that it is fully prepared to operate in a freely competitive market, regardless of the size of its competitors.[22] Rather, it asks the Commission to condition authorization of the instant application on the condition that MCI agrees to conduct negotiations with overseas postal, telephone and telegraph authorities (PTTs) for record services on a fully separated basis from any MCI negotiations with PTTs for international telephone operations. In the absence of such separation between MCI's voice and record operations, ITT Worldcom speculates that, based on the record of MCI's ownership of WUI, MCI may try to trade concessions on record-services accounting rates for favorable treatment from PTTs for its international telephone services. In ITT Worldcom's view, such actions are seriously detrimental to the United States balance of trade and to the overall economic health of the U.S. record carrier industry.[23]

15. IT&E, a Guam-based long distance reseller, filed a petition to deny the application only insofar as it involves transfer of control over assets used to provide MTS and IMTS services originating on Guam. Alternatively, IT&E asks that certain conditions be attached to any authorization to transfer such assets. IT&E contends that the application is misleading because it does not emphasize that RCA Globcom is a dominant carrier with respect to IMTS traffic to and from Guam. IT&E believes RCA Globcom's IMTS and MTS annual revenues for Guam traffic to be approximately 12 percent of the $160 million acquisition price and about 12-1/2 percent of RCA Globcom's total worldwide revenue.[24] IT&E states that it is RCA Globcom's only competitor for MTS and IMTS telecommunications services originating on Guam. It alleges that RCA Globcom's current dominant market share and access advantage on Guam are being unlawfully maintained through anticompetitive activities.[25]

16. Among other things, IT&E asks the Commission to void ten year contract between RCA Globcom and the United States Department of the Navy concerning overseas telephone services from Guam. IT&E alleges that it is effectively "locked-out" of the military market for all but incidental volumes of traffic due to the manner in which military installations on Guam are interconnected with RCA Globcom's facilities. It asks the Commission to order the Applicants in this proceeding to take all steps necessary to establish equality of access between the military base central office switch and IT&E's facilities comparable to that being furnished under the contract to RCA Globcom.

17. IT&E also asks the Commission to condition the transfer to RCA Globcom or MCI of any further ownership and operating interest in the Pulantat, Guam earth station "to require the transferee to extend an offer to IT&E to purchase an indefeasible right of use (IRU) in earth station capacity at fair and reasonable terms not to exceed a pro rata share of the net book value of the earth station at the time of transfer . . . ."[26] According to IT&E, such condition would let it avoid increased tariffed rates for use of earth station capacity and "otherwise immunize itself from subsequent anticompetitive changes in the terms and conditions of its use of the earth station in the future."[27]

D. ***The Applicants' Opposition to Petitions to Deny***

18. The Applicants' primary response to allegations of unlawful market concentration in this proceeding is that the petitioners have not defined the market correctly. The Applicants contend that the relevant product market is not the narrow record carrier market relied on by the Teamsters and TRT but a market including recent technological advances such as facsimile, computer-based messaging systems, voice mail and other IMTS- based services which are substitutable for non-IMTS services in international telecommunications. They contend that demand for these newer services is growing at ever-increasing rates, while demand for traditional telex service is declining. The proper market, according to the Applicants, is either international telecommunications or electronic messaging. They contend that when viewed in that context, MCI and RCA Globcom's market shares are insignificant and the proposed acquisition will not adversely affect the level of competition. Although the Teamsters purport to rely on Justice Department merger guidelines, the Applicants note that on October 30, 1987, the Applicants made the required filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and believe it significant that the Department has taken no action against the proposed acquisition.

19. Moreover, Applicants argue that structural separation of international accounting rate negotiations and other negotiations requested by ITT Worldcom is unnecessary because "[t]he Commission has in place extensive and effective regulatory mechanisms that guard against anticompetitive conduct arising from accounting rate negotiations . . . ."[28]

20. Finally, the Applicants contend that consideration of the IT&E petition in the context of this proceeding is entirely unwarranted because IT&E has failed to allege any nexus between the alleged anticompetitive behavior by RCA Globcom in Guam and the acquisition of RCA Globcom by MCI. The Applicants note that other remedies are available to IT&E either from the Commission or the courts and they state that IT&E's antitrust action will be unaffected by the proposed acquisition.

E. ***Replies of the Teamsters and TRT and Applicants' Response***

21. The Teamsters reply[29] that the Applicants' view of the relevant product market as specified in their opposition is tantamount to the filing of an untimely new case-in-chief that was not supported by affidavit.[30] The Teamsters contend that the application should be denied or designated for further proceedings because statements of the Applicants are at variance with its view that the IMTS and non-IMTS markets are not substitutable.[31]

22. Similarly, TRT objects to the Applicants' attempt to support their application by characterizing the relevant market as "electronic messaging" or "electronic mail".[32] TRT continues to maintain that the Commission's obligations under section 222 of the Act should not permit approval of the acquisition of the second largest IRC by a firm which already owns the third largest IRC. TRT reiterates that this acquisition would concentrate more than 85 percent of the "international record communications market" in only two firms.[33]

23. In their response, the Applicants disagree that international record communications is the relevant product market for competitive purposes. They contend that the

purpose of section 222 was to promote the deregulation of international communications and that it would be "absurd" to treat deregulated traffic which competes directly with regulated traffic as not being in the same relevant market. Accordingly, the Applicants contend that the attempt by the Teamsters and TRT to focus solely on data filed with the Commission by carriers which are still regulated is unavailing.[34]

F. *IT & E's Motion To Supplement Its Petition To Deny and Applicants' Response*

24. IT&E asks the Commission to accept a "Reply" tendered for filing with its motion for leave to supplement its Petition to Deny. In support of its motion, IT&E states that when it filed its petition it believed all issues pertaining to an alleged unlawful traffic agreement between GTA and RCA Globcom were properly left before the court where it had filed antitrust complaints. However, IT&E notes that it subsequently withdrew the second of two complaints it had filed with the antitrust court, at the court's suggestion, in order to pursue relief before the Commission. IT&E states that it is redrafting its complaint for filing with the Commission in order to challenge the legality of the traffic agreement between GTA and RCA Globcom. IT&E further states that it must accept access service from GTA under the same terms that RCA Globcom has accepted or face losing its customer base to RCA Globcom. According to IT&E, it neither can afford to operate under such terms nor compete against RCA Globcom as long as that carrier is the sole beneficiary of certain preferential arrangements with GTA. It claims that it cannot attain prompt relief from the effects of the alleged unlawful agreement through a complaint brought before the Commission in time to affect the subject application, and seeks to include relief from the agreement among the matters to be resolved in this proceeding.

25. The Applicants oppose IT&E's motion. As they did in response to IT&E's Petition to Deny, the Applicants maintain that the allegations IT&E seeks to raise are totally irrelevant to this proceeding. They also note that the supplemental pleading IT&E seeks to file is not contemplated in the established pleading schedule. The Applicants argue that even if IT&E had a legitimate complaint about RCA Globcom, RCA Globcom's ownership is irrelevant to that complaint. Whatever complaint IT&E may have against RCA Globcom can, in their view, be fully adjudicated in appropriate proceedings either in court or at the Commission and its relief will be unaffected by a grant of the application. They note that although IT&E indicated that it would file a formal complaint with the Commission, IT&E has not dismissed its antitrust action against GTA and RCA Globcom. The Applicants contend that both of IT&E's alleged reasons for requesting leave to supplement its Petition to Deny relate to actions taken by GTA and not by RCA Globcom.[35]

II. DISCUSSION

26. Sections 214 and 310(d) of the Act require that we find that the public interest, convenience, and necessity will not be adversely affected by the transfer of control of a company holding section 214 certificates and radio licenses.[36] Subsumed within this requirement is that the Commission review, as may be appropriate, the citizenship, character, financial, technical and other qualifications of the transfer applicant.[37] In this case, it appears that MCI, a long-term Commission licensee and communications carrier, satisfies the threshold qualifications. No contention is raised that MCI lacks the financial wherewithal or technical expertise to provide service consistent with the public convenience and necessity. Instead the petitioners generally focus on alleged anticompetitive effects of the proposed transaction or seek to impose conditions on its approval. Accordingly, we address first the competitive impact of the proposed transfer and whether it holds promise for benefiting the public interest, convenience and necessity. We then discuss the merits of the conditions requested by ITT Worldcom and IT&E.

A. *Competitive Impact*

27. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[38] The legislative history "illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Under section 11 of that statute, the Commission is empowered with direct enforcement authority over section 7 in the case of common carriers.[39] The courts have construed this to mean that the requirements of section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs the consequences with other public interest factors."[40] In other words, the Commission is required to consider anticompetitive consequences as one part of its public interest calculus.[41]

28. The applicable judicial precedents direct that the section 7 analysis begin with a determination of the relevant market in which competition may be threatened.[42] In turn, in order to ascertain the market affected for purposes of section 7, we must delineate both the relevant "product" market (*i. e.*, the "line of commerce) and the relevant "geographic" market (*i. e.*, "section of the country).[43] To assist us in this endeavor, we have used as guidance the most recent Department Guidelines.

29. We note initially that the Department of Justice had an opportunity to review the subject application as well as a filing made pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18(a). It did not object to the proposed acquisition or otherwise question its lawfulness. We have independently reviewed the material filed pursuant to the Hart-Scott-Rodino Act and have concluded that no basis is provided therein to deny the proposed transaction.[44]

1. *Domestic Market*

30. In the domestic *Competitive Carrier Rule Making* proceeding in CC Docket No. 79-252, after using an antitrust analysis of market power, the Commission adopted streamlined regulations for certain carriers without market power (nondominant carriers) in light of the increasingly competitive domestic telecommunications market.[45] The market was defined as a single nationwide market for interstate, interexchange telecommunications, with no relevant submarkets. The scope of the proceeding was later extended to include services provided to all domestic

points outside of the continental United States, including Guam.[46] The Commission adopted forebearance policies with respect to nondominant carriers. It determined that AT&T and other carriers with which it had joined to provide service on a joint venture basis must be classified as dominant carriers.[47]

31. Except for IT&E's concerns about MTS service to and from Guam, no objection has been raised to grant of the subject application insofar as domestic interstate service is concerned. No evidence has been presented to show that MCI's acquisition of RCA Globcom would have any anticompetitive effect or require a change from its current classification as a nondominant carrier generally in the domestic interstate market. As we conclude hereinafter, the fact that RCA Globcom is, and would continue after its acquisition by MCI to be, a dominant carrier with respect to interstate telecommunications service between Guam and other domestic points has not been shown to be of any decisional significance to this proceeding.

2. International Markets

32. Subsequently, in establishing competitive carrier policies for international telecommunications common carriers in CC Docket No. 85- 107,[48] the Commission concluded that, in contrast with the single product market and single geographic market it previously determined were applicable to domestic telecommunications services, international telecommunications services were properly divided into two broad primary product markets, *i. e.*, IMTS and non-IMTS, and every country constituted a separate geographic market.[49] The Commission found that, with respect to IMTS, AT&T was a dominant carrier and that RCA Globcom also was a dominant carrier for service it provided to and from Guam.[50] With respect to non-IMTS services for any geographic market, it found that no carrier was dominant, including the IRCs.[51]

33. The Commission had previously observed that the voice/record dichotomy in international service offerings evolved from the historical differences in international voice and record technologies and the provision of these services by different carriers over separate networks.[52] In 1982, it revisited its TAT-4 protectionist decision which had insulated the IRCs from competition with AT&T and which had assisted them in making the transition from an older and less desirable radio technology to a newer and more desirable cable technology. The Commission concluded that changed circumstances and evolving technology required the elimination of that dichotomy so that AT&T could provide international record services and the IRCs could provide international voice services. It found such action consistent with the Communications Act, including section 222, as amended by the Record Carrier Competition Act of 1981, and that the Communications Act contained sufficient safeguards to assure fair competition.[53]

34. In 1985, the Commission noted that over the past several years the market for international telecommunications services had experienced rapid growth and substantial transformation in terms of both new carriers and new services, including a large number of resellers and enhanced service providers offering a variety of international services.[54] Among the new service offerings there noted were INTELSAT Business Service and a number of recently introduced high speed data services.[55] The Commission also stated that it expected recent Commission decisions would provide a greater range of service and facility options for customers and carriers.[56] Based on the record in the proceeding, the Commission affirmed its previous tentative conclusion that IMTS and non-IMTS then represented two distinct product markets.[57] The Commission recognized that the existence of resellers and refilers might be evidence of some limited supply substitutability from IMTS to non-IMTS services, particularly with the use of Dataphone-type customer premises equipment.[58] Accordingly, it stated that the line between IMTS and non-IMTS might eventually be blurred.[59] However, because it found that a large number of telex users had not switched to IMTS and Dataphone despite higher telex rates, the Commission concluded at that time that the markets were "not yet at that point."[60]

35. For purposes of weighing the proposed acquisition, we agree with the Applicants' view[61] that the significance of *International Competitive Carrier Policies, supra,* is the Commission's conclusion that: "Any non-IMTS service provider attempting to price uncompetitively will be met by market forces making such action difficult if not impossible to sustain."[62] As the Applicants note, the Commission there stated that:

> [i]n almost every country, and certainly in all major geographic markets, there are a number of firms providing a wide variety of non-IMTS services on both a real time and store-and-forward basis. This includes entities providing telex, TWX, private line, telegram, IBS, low and high speed data, teleconferencing and enhanced service offerings. Thus, any carrier attempting to raise prices for non-IMTS services would find that it would lose business to other carriers offering identical or substitutable services at relatively lower prices. Any carrier lowering prices in an attempt to drive competitors out of the market would find that it was unable to maintain the low prices for a long enough period to drive all competitors out of the market or that competitors would re-enter the market when it attempted to charge monopoly rates.[63]

Although the Commission recognized that conceptually enhanced services belonged in the "non-IMTS" part of the international market, the record carrier data upon which the Teamsters and TRT rely do not by themselves identify changing market conditions in international markets or the ability of MCI to use a larger market share after the merger to engage in monopolistic practices.

36. In cases involving unregulated industries, the courts frequently approach the problem of measuring monopoly or market power, *i. e.*, the power to control prices or exclude competition,"[64] by computing a company's market share in the relevant product and geographic markets. Accordingly, market power ordinarily can be inferred from a predominant share of the market. However, such inference or presumption is rebuttable.[65] While market shares are ordinarily a primary indicia of market power, the Supreme Court has stated that the anticompetitive effect of a horizontal combination[66] is not to be measured by any single quantitative or qualitative test. [67] Rather, the combination is to be viewed functionally in the context of the particular market involved, its structure, history and probable future.[68] Moreover, in cases involving regulated industries, not only is a prima facie case or inference based on statistical market share rebuttable, but reliance

on such a statistical market share approach is itself "a questionable approach." *Southern Pacific Communications v. AT & T*, 740 F.2d 980, 1000 (1984), *cert. denied*, 470 U.S. 1005 (1985). The United States Court of Appeals for the District of Columbia Circuit there stated:

> A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power. Therefore, in such cases market share should be at most a point of departure in determining whether monopoly power exists. Ultimately, a court *should focus directly upon the ability of the regulated firm to control prices or exclude competition*. . . . (emphasis added)[69]

37. Even in a highly concentrated market, a horizontal acquisition may not necessarily lessen competition where the merged companies lack market power to control prices or exclude competition because of other pertinent factors such as ease of entry into the market and changing market conditions. In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), a civil antitrust action by the government had challenged the acquisition by a deep-shaft coal mining company and its successor of a strip-mining competitor as being violative of section 7 of the Clayton Act. The Supreme Court held that while the Government's statistical showing might have been sufficient to support a finding of "undue concentration" in the absence of other considerations, the trial court was justified in finding that other pertinent factors affecting the coal industry and appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition. 415 U.S. at 497-98. The Court further found that appellees' failure to meet the prerequisites of a failing-company defense did not detract from the validity of the trial court's analysis. *Id.* at 508.

38. In opposing the proposed acquisition, the Teamsters place principal, if not exclusive, reliance on a market share and HHI analysis, a methodology described in the Department Guidelines. However, the Teamsters fail to take into account other factors required by such guidelines and the fact that the HHI test is a tool used by Justice Department attorneys in determining which mergers or acquisitions to challenge.[70] The tool is certainly not controlling when, as here, the relevant market is characterized by ease of entry and potentially competitive services.[71] The data constructed by the Teamsters for what it characterizes as the "non- voice or record service" market and extrapolated to represent the relevant market are not only dated but do not yield reliable or valid HHI analyses because they do not accurately depict the relevant total non-IMTS market or the true number of players therein.[72] As the court observed in a case relied on by the Teamsters, when the relevant market is not defined correctly, "the HHI's computed are meaningless and do not reflect market reality." *FTC v. PPG Industries, Inc.*, 798 F.2d 1500 (D.C. Cir. 1986) (*PPG Industries*) at 1503.[73] The Teamsters' analysis is therefore rejected.

39. In view of all the foregoing, we find no basis for asking the Commission to reverse its previous conclusions in *International Competitive Carrier Policies*, *supra*, that the non-IMTS international telecommunications market is vigorously competitive and that no carrier has market power or is dominant in the provision of non-IMTS services. Neither MCI nor RCA Globcom presently has market power in either the IMTS or non-IMTS markets, except for RCA Globcom's provision of IMTS service to and from Guam.[74] In sum, we conclude that the proposed acquisition will not in any way be inimical to the competitive structure of the industry in which the companies operate.

40. The non-IMTS market discussed by the Teamsters and TRT is shrinking part of international telecommunications. Telex, telegraph, and private line revenues of IRCs have declined over recent years.[75] The Applicants note that even the limited data reported to the Commission, using the IMTS/non-IMTS distinction, show that the 1985 non-IMTS figures produced by the Teamsters and the 1986 figures produced by TRT demonstrate that RCA Globcom's share of the non-IMTS market dropped almost 25 percent in one year.[76] That kind of volatility in market shares is characteristic of a changing market. As the Applicants further note,[77] the fact that the top three traditional IRCs have experienced shrinking revenues since 1983, while TRT, FTC and Western Union have had increasing international revenues, further underscores the healthy competitive state of the IRC industry.[78]

41. Moreover, the Commission previously found that non-IMTS services, with the exception of television service, are substitutable for one another and that entry and competition in the non-IMTS market as a whole are not limited.[79] In finding that the existence of substantial market discipline on the IRCs and other non-IMTS service providers justified relaxation of Commission regulation of their service offerings, the Commission particularly noted "the rapid growth in new and innovative non- IMTS services such as IBS and the general greater acceptance which appears to be developing among foreign administrations to operate with additional (new) carriers. . . ."[80] In *International Competitive Carrier Policies*, *supra*, the Commission concluded that vigorous competition exists in the non- IMTS market and that no carriers, including the traditional IRCs, were dominant in the provision of non-IMTS services for any geographic market.[81]

42. Furthermore, as Applicants demonstrate, a variety of facsimile services used as alternatives to traditional telex involve the use of IMTS services. The same can be true of services of resale carriers, a variety of private networks, such as those of the Society for Worldwide Interbank Financial Telecommunications (SWIFT) and Societe Internationale De Telecommunications Aeronatiques (SITA) used by financial and air transportation systems, respectively, and enhanced service providers, including packet-switched electronic mail services, whose traffic figures are not even reported to the Commission.[82] The Applicants note that AT&T, among others, competes with the traditional IRCs through various enhancements to its IMTS service, such as facsimile, computer-to-computer messaging and voice mail.[83] There has been a rapid growth of these services which are available for use if subscribers for traditional IRC services are dissatisfied with the cost, quality or terms offered by the IRCs for such services.[84]

43. The low barriers to entry in adjacent markets which provide potential future competition for telex are illustrated by the large number of new resale carriers the Commission has approved in recent years. As Applicants note, from October 1985 through December 1987, section 214 authorizations for international resale have been granted to more than 30 new carriers.[85] The Commission continues to receive applications for authority to resell international services from new firms on a weekly basis and the total number of firms authorized to provide such

resale is constantly growing.[86] All such authorized resale carriers are capable of providing international facsimile and in some cases other value-added international services in competition with telex. The same is true of the large number of enhanced service providers.

44. TRT has not provided evidence to show that approval of the proposed acquisition would be inconsistent with the Commission's obligations under the Record Carrier Competition Act of 1981 to promote the development of fully competitive domestic and international markets for record communications service and facilities, including terminal equipment. Nor has TRT placed evidence in the record to show that grant of the instant application would contravene the Commission's mandate under that statute "to forbear from exercising its authority under this Act as the development of competition among record carriers reduces the degree of regulation necessary to protect the public."[87] The Commission's obligation under section 222(b)(1) of the Act is not necessarily to protect the traditional "IRC industry," any "record carrier," or other provider of non-IMTS services, including "record communications service" as defined in the statute.[88] Rather its obligation is to foster competition in record communications service.[89] The record before us does not show that the proposed acquisition will result in a substantial lessening of competition in the provision of record communications services or non-IMTS services even if MCI were to combine the services of RCA Globcom and WUI and notwithstanding Western Union's merger with ITT Worldcom. On the contrary, the acquisition of RCA Globcom by MCI should result in certain efficiencies and strengthen MCI or its affiliated companies' ability to compete both in the United States and abroad against companies like AT&T, GTE, Western Union, Comsat, TRT, FTC Communications, foreign-owned or controlled companies, and others, including nonregulated enhanced service providers.

B. ***Condition Requested by ITT Worldcom***

45. ITT Worldcom does not object to the proposed acquisition but expressed concern that MCI could attempt to trade concessions on record services accounting rates in return for favorable PTT treatment for its international voice services. Accordingly, ITT Worldcom asks that a grant of the instant application be conditioned on MCI agreeing to conduct its international record accounting rate negotiations with PTTs on a fully separated basis from those of its international voice services. We do not believe it necessary to impose structural separation on the Applicants in light of the vigorous and established competition that exists in the non- IMTS market.[90] The oversight system that the Commission established in CC Docket No. 85-204 provides a check against the type of anticompetitive conduct about which ITT Worldcom expresses concern. *See International Settlements Policy Order*, *supra*. Furthermore, as the Applicants noted, structural separation would single out MCI for an unwarranted regulatory burden that its competitors would not have to bear. While structural separation decreases opportunities for anticompetitive conduct, it also can decrease efficiency and affect a carrier's ability to compete. Further, ITT Worldcom has failed to make a prima facie case to support the premise that anticompetitive conduct will likely take place in the absence of such separation. To the extent that there may be efficiencies to be gained by combining carrier operations, carriers should not be precluded from capitalizing on them when countervailing regulatory considerations do not demand stringent separation. We will continue to use the information filed pursuant to section 43.53 of the Commission's rules, 47 C.F.R. § 43.53, to monitor direct and indirect international traffic arrangements.

46. Moreover, an application for waiver must be submitted to the Commission for departures from its uniform settlement agreements policy for each proposed modification of a carrier's operating agreement with a PTT where more than one service provider offers a particular service to a particular foreign jurisdiction. After public notice is given of such an application, it is subject to a 21-day period for the filing of objections or comments and a further 29-day staff review period before the application may be granted. The burden of proof rests on the proponent of a waiver and such proponent must fully disclose all matters of material fact[91] and state *inter alia*, "whether there was any attempt by the PTT(s) involved to secure concessions in the accounting rate through any measures . . . which would indicate whipsawing."[92] In addition, under the streamlined procedures adopted in *International Settlements Policy Order*, carriers may file informal or formal complaints pursuant to section 208 of the Act, 47 U.S.C. § 208, and the Commission's rules[93] to obtain redress for violations of its international settlements policy.[94] ITT Worldcom has not provided any factual evidence in support of its assertion that MCI has demonstrated a willingness to sacrifice the interests of WUI in its negotiations with overseas PTTs. In *Competitive Carrier Rule Making*, *supra*, the Commission stated that the public interest is not served by the imposition of unnecessary regulatory burdens on nondominant carriers with consequent costs and inefficiencies.[95] Therefore, we conclude that ITT Worldcom has failed to justify its request that we mandate full separation between MCI's voice and record negotiations with PTTs.

C. ***Conditions Requested by IT & E***

47. IT&E, a Guam-based long-distance reseller, competes with RCA Globcom for MTS and IMTS services originating on the island of Guam. As stated at note 25, *supra*, it has filed an antitrust suit against GTA, Guam's local exchange carrier, and RCA Globcom. It has alleged that GTA and RCA Globcom have entered into anticompetitive agreements and technical interconnection arrangements in violation of the antitrust laws and the Communications Act. If we authorize transfer of RCA Globcom's Guam facilities and assets essential to the provision of MTS and IMTS to and from Guam,[96] IT&E asks that the Commission void an exclusive ten-year contract for MTS and IMTS services to the Naval Facilities Engineering Command and all U.S. Government installations on Guam, or condition grant of the application on a rescission of the contract by RCA Globcom.

48. IT&E has not shown that authorizing MCI to acquire control of RCA Globcom would in any way adversely affect its pending antitrust suit, any pending proceeding in which it has filed pleadings before the Commission,[97] or any complaint that it may wish to file with respect to the traffic agreement between GTA and RCA Globcom and related activities. We also find that IT&E failed to establish any nexus between the matters about which it complains and the relief it seeks with respect to the instant application.[98] The proper forum for resolving IT&E's allegations of unlawful conduct is either with its pending antitrust complaint before the court or a com-

plaint filed with the Commission pursuant to section 208 of the Act. It would be premature for us to deny the proposed transfer of control or impose conditions merely on the basis of pleadings raising issues that have not yet been adjudicated.[99] Accordingly, IT&E's petition to deny in part or condition the application is denied.

III. CONCLUSION

49. We conclude that MCI's acquisition of RCA Globcom should result in improved efficiencies and strengthen MCI or its affiliated companies' ability to compete both in the United States and foreign countries. The international telecommunications market for non-IMTS services is both expanding and characterized by vigorous competition, not only between regulated carriers but also as the result of potential competition from services provided by deregulated carriers, unregulated enhanced service providers, private corporate networks and other domestic and foreign entities. We have found no evidence that the acquisition would tend to reduce competition in any relevant product or geographic market. There is no evidentiary basis in the record to find that the conditions recommended by ITT Worldcom and IT&E are necessary and we therefore find that such conditions would not serve the public interest. Accordingly, having reviewed the application and the pleadings filed in this matter, we conclude that MCI is legally, technically, financially and otherwise qualified to operate RCA Globcom and that grant of the subject application for consent to transfer control of RCA Globcom to MCI will serve the public interest, convenience and necessity.

CERTIFICATE AND ORDERING CLAUSES

50. IT IS CERTIFIED, pursuant to 47 U.S.C. § 214(c), that the transfer of facilities approved in this order WILL SERVE the public interest, convenience and necessity.

51. IT IS ORDERED, pursuant to 47 U.S.C. § 34, 154(i), 154(j), 212, 214(c), 308, 309 and 310(d), that the application of General Electric Company, GE Subsidiary, Inc. 21, and MCI Communications Corporation IS GRANTED.

52. IT IS FURTHER ORDERED that the Applicants' request for a ruling that, upon consummation of the acquisition here approved, MCI will commonly own MCI Telecommunications Corporation, MCI International, Inc., MCI International Telecommunications Corporation, Western Union International, Inc., Satellite Business Systems, and RCA Global Communications, Inc. IS GRANTED.

53. IT IS FURTHER ORDERED that the Motions for Leave to File Replies of the Teamsters and TRT ARE GRANTED.

54. IT IS FURTHER ORDERED that the Petitions to Deny filed by the Teamsters and TRT ARE DENIED.

55. IT IS FURTHER ORDERED that the Petition to Condition Authorization, filed by ITT Worldcom, IS DENIED.

56. IT IS FURTHER ORDERED that IT&E's Reply IS ACCEPTED as part of the record and its Motion For Leave To Supplement Its Petition IS DISMISSED as moot.

57. IT IS FURTHER ORDERED that the Petition to Deny filed by IT&E IS DENIED.

58. IT IS FURTHER ORDERED that the Motion to Supplement Comments filed by IT&E on May 3, 1988, IS DISMISSED as untimely.

59. IT IS FURTHER ORDERED that this order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 310(d) provides generally that no radio construction permit or license shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served. Section 212 makes it unlawful for any person to hold the position of officer or director of more than one carrier subject to the Act without Commission authorization. Finally, section 214 provides in pertinent part that no carrier shall acquire or operate any line or engage in the transmission over such line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity require such construction or operation.

[2] Section 34 requires a written license to land or operate a submarine cable connecting the United States with a foreign country.

[3] 47 CFR Parts 1, 62 and 63 contain, respectively, the Commission's rules of practice and procedure, interlocking directorates, and extension of lines and discontinuance of service by carriers.

[4] RCA Globcom holds authorizations from the Commission to provide common carrier communications service regulated under Title II of the Communications Act as well as radio licenses granted pursuant to Title III of the Act.

[5] Also before us are: Petitions to Deny timely filed by Locals 9, 10, and 111 of the American Communications Association, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Regular Common Carrier Conference (Teamsters), IT&E Overseas, Inc. (IT&E), and TRT Telecommunications Corporation (TRT); a Petition to Condition Authorization filed by ITT World Communications, Inc.; an Opposition to the Petitions to Deny filed by the Applicants; separate Motions for Leave to File a Reply filed by the Teamsters and TRT; a statement in support of such motions filed by the Applicants; Replies filed by the Teamsters and TRT; a Motion for Leave to Supplement its Petition to Deny and a Reply filed by IT&E; an Opposition to IT&E's motion filed by the Applicants; a letter from William J. Potts, Jr., to Adrien Auger (Mar. 14, 1988); and a Motion to Supplement Comments filed by IT&E.

[6] Application, Exh. 1 at 2 and 35. While MCI would not directly acquire any debt as the result of the proposed transaction, the total liabilities of RCA Globcom and other subsidiaries, excluding stockholder's equity, was approximately $148.6 million as of June 30, 1987. Letter from William J. Potts, Jr., *supra*.

[7] *See* Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 100 FCC 2d 250 (1984).

[8] Consent to the proposed merger of Western Union Telegraph Company (Western Union) and ITT World Communications (ITT Worldcom) was granted on October 1, 1987. Western Union

Corporation, 2 FCC Rcd 6063 (Com. Car. Bur. 1987). The merger was consummated on December 30, 1987. Letter from Philip V. Permut to H. Walker Feaster, III (Jan. 6, 1988).

[9] The Commission has approved the transfer of PTAT's stock to NYNEX. Tel-Optik, Limited, 2 FCC Rcd 2276 (1987). A petition seeking a waiver of the line of business restrictions is pending before the Department of Justice.

[10] In 1985, the Commission determined that international telecommunications services could be viewed as consisting of two primary product markets, *i. e.*, international message telephone service (IMTS) and non-IMTS. International Competitive Carrier Policies, 102 FCC 2d 812, 816 (1985), *recon. denied*, FCC 86-309 (released Aug. 7, 1986), 60 RR 2d 1435 (1986). Examples of non-IMTS services are telex, telegram, TWX, private line, high and low speed data, videoconferencing and International Business Service (IBS). *Id.* at 816 n.6.

[11] Petition to Deny at 2.

[12] 49 Fed. Reg. 26824 (June 29, 1984); 2 Trade Reg. Rpts. (CCH) ¶¶ 4490-95.

[13] The HHI is determined by adding the squares of the individual market shares of all the firms in the market. The maximum HHI, when one firm has a 100 percent market share, thus is 10,000. On the other hand, if ten firms each have a 10 percent market share, the market would have an HHI of 1000. A post-merger HHI of less than 1000 is deemed to reflect an unconcentrated market and will not be challenged by the Justice Department "except in extraordinary circumstances." Department Guidelines at § 3.11(a); 2 Trade Reg. Rpts. at ¶ 4493.

[14] Teamsters' Petition to Deny at 12-14.

[15] *Id.* at 16-18.

[16] 47 U.S.C. § 222(b)(1). The term "record communications service" in this context is defined as "services traditionally offered by telegraph companies, such as telegraph, telegram, telegram exchange, and similar services involving an interconnected network of teletypewriters." 47 U.S.C. § 222(a)(3). The term "record carrier" is defined as "a common carrier engaged in the offering for hire of any record communications service, including service on interstate network facilities between two points located in the same State . . . . [but] does not include any common carrier which derives a majority of its revenues during any calendar year from the provision of services other than record communications service." *Id.* at (a)(2).

[17] TRT's Petition to Deny at 2.

[18] *Id.* at 7.

[19] *Id.* at 3.

[20] *Id.* at 10.

[21] *Id.* at 10-11.

[22] ITT Worldcom Petition to Condition Authorization at 2.

[23] *Id.*

[24] IT&E Petition to Deny at 4.

[25] *Id.* at 2. On November 13, 1987, prior to filing its Petition to Deny, IT&E filed an antitrust complaint in federal district court charging RCA Globcom and Guam Telephone Authority (GTA), the Guam local exchange carrier and a public corporation of the Government of Guam, with, *inter alia*, contracting in restraint of trade. Thereafter, on December 2, 1987, IT&E filed a second complaint with the court to enjoin GTA from continuing to extend what it characterized as preferential treatment and technical access arrangements to RCA Globcom. At the court's suggestion, IT&E voluntarily withdrew its second complaint on December 21, 1987 in favor of pursuing relief directly before the Commission. It did not choose to dismiss its initial complaint and that antitrust action remains before the court. IT&E Overseas, Inc. v. RCA Global Communications, Inc., No. 87-3089 (D.D.C., filed Nov. 13, 1987).

[26] *Id.* at 12.

[27] *Id.* at 13. On December 21, 1987, IT&E requested that its Petition to Deny, insofar as it was relevant to RCA Globcom's then pending application to acquire 100 percent ownership and operating interest in the Pulantat earth station on Guam (File No. I-T-C-87-175), also be considered as an untimely petition to deny that application. IT&E also has petitioned for leave to file a petition to reject proposed rate increases in RCA Globcom Tariff F.C.C. No. 107 for use of the Guam earth station (Transmittal No. 5257, filed Nov. 16, 1987).

[28] Opposition to Petitions to Deny at 3 *citing* Implementation and Scope of the Uniform Settlements Policy for Parallel International Routes, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (1986), *modified on reconsideration*, 2 FCC Rcd 1118 (1987), *further reconsidered*, 3 FCC Rcd 1614 (1988) (*International Settlements Policy Order*).

[29] The Teamsters and TRT filed separate Motions for Leave to File a Reply to the Applicants' Opposition to their Petitions to Deny the application. They noted that replies generally are permissible under section 1.45(b) of the Commission's rules although the November 13, 1987 public notice establishing a pleading cycle in this matter, Public Notice, 2 FCC Rcd 6902 (1987), did not authorize such pleadings. The Teamsters and TRT's motions are unopposed. The Applicants filed a statement in support of the motions to accept the tendered Replies to their opposition. In the absence of any objection thereto, we accepted and considered the tendered replies.

[30] Subsequently, the Applicants filed an affidavit with respect to the scope of the international communications and electronic messaging markets previously described in their Opposition to the Teamsters and TRT's petitions to deny, continuing to disagree with those parties' view of the relevant market. Affidavit of Sergio Wernikoff, attached to the Applicants' "Statement in Support of TRT Motion for Permission to File Reply and to Teamsters Motion for Leave to File Reply", filed January 12, 1988. We accepted the affidavit as part of the record in this proceeding.

[31] Teamsters' Reply at 2-3.

[32] TRT's Motion for Permission to File Reply at 2.

[33] TRT's Reply at 3.

[34] Applicants' statement in support of TRT and Teamsters' Motions for Leave to Reply at 3-4.

[35] Opposition to IT&E Motion at 2. While the Applicants contend that IT&E is not a "party in interest" with standing to file a Petition to Deny under section 309 of the Act, we found that this is also a Title II proceeding and we invited parties wishing to comment on the proposed acquisition of RCA Globcom to do so by December 11, 1987. Public Notice, 2 FCC Rcd 6902 (1987). We note that IT&E, a long-distance reseller, is a competitor of RCA Globcom, and we have considered the allegations raised in its timely filed petition. However, we agree with the Applicants that IT&E has not established a nexus between the matters about which it complains or the relief it requests and a grant or denial of the application. Unlike the unopposed replies of the Teamsters and TRT, IT&E has not shown good cause for supplementing its petition in this matter with a pleading not contemplated by the pleading schedule established for this application proceeding. Nevertheless, we have also considered the materials set forth in its "Reply" and accorded it appropriate weight in this proceeding. We have, of course, noted that issues related to those it seeks to raise here are currently before the Federal district court and any alleged violations of the antitrust laws or of the Communications Act which IT&E wants the

Commission to consider will be examined in the context of an appropriate complaint pursuant to section 208 of the Act, if and when such complaint is filed by IT&E.

[36] *See* note 1, *supra*.

[37] *See* 47 U.S.C. §§ 308(b) and 310(d).

[38] 15 U.S.C. § 18.

[39] *Id.* at § 21.

[40] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[41] *Id.* at 87, *citing* Denver and Rio Grande Western Railroad v. United States, 387 U.S. 485 (1967).

[42] United States v. Continental Can Co., 378 U.S. 441, 447 (1964); United States v. E.I. du Point de Nemours and Co., 353 U.S. 586, 593 (1957); Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n.5 (1949); *see also* Department Guidelines, 2 Trade Reg. Rpts. (CCH) ¶ 4490, at ¶ 4492.

[43] Brown Shoe Co. v. United States, *supra*, 370 U.S. at 324 (1962).

[44] Pursuant to Executive Order No. 10530 (May 10, 1954), we requested the Department of State's view on whether to approve the transfer of control of RCA Globcom's cable landing licenses. The Department of State has indicated it does not object to the transfer. Letter from Randolph C. Earnest, Director, Regulatory and Treaty Affairs, to George S. Li, Acting Chief, International and Facilities Division (Apr. 5, 1988).

[45] Policies and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *recondenied*, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), *recon. denied*, FCC 851-572 (released Nov. 20, 1985), Sixth Report and Order, 50 Fed. Reg. 1215 (Jan. 10. 1985), *vacated on other grounds*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[46] *Id.* at Third Report and Order. *See* International Competitive Carrier Policies, *supra*, 102 FCC 2d at 815 (1985).

[47] First Report and Order, 85 FCC 2d at 22-24 (1980).

[48] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *reconsideration denied*, 60 RR 2d 1435 (1986).

[49] *Id.*, 102 FCC 2d at 828. The Commission found that Comsat was the only provider of international television service, space segment, and multipurpose earth station services at that time and, accordingly, found such services to be relevant submarkets. It classified Comsat International as a dominant carrier with respect to the provision of such services. *Id.* 838-40.

[50] *Id.* at 830, 832.

[51] *Id.* at 833.

[52] Overseas Communications Services, 92 FCC 2d 641, 642 (1982).

[53] *Id.* at 650-51, 661 n.40.

[54] International Competitive Carrier Policies, 102 FCC 2d at 820-21. Even when the relevant markets may be highly concentrated, amelioration of market structure conditions is possible where there is reasonable opportunity for new firms to enter especially where, as here, the market for international telecommunications services has experienced rapid growth. Where entry into a market is relatively easy so that existing competitors could not succeed in raising prices for any significant period of time, the Department of Justice generally will not challenge mergers in that market. Department Guidelines, Trade Reg. Rpts. (CCH), *supra*, at 6879-15.

[55] International Competitive Carrier Policies, 102 FCC 2d at 821.

[56] Those decisions included Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, 100 FCC 2d 177 (1985) (Authorized User II) (allows non-common carriers to lease INTELSAT capacity directly from Comsat and permits Comsat, through a separate subsidiary, to provide end-to-end services); Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 100 FCC 2d 250 (1984) (provides for the independent ownership of international earth stations); Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1201 (1985) (granting conditional authorizations for international communications satellite systems separate from the INTELSAT system); and Tel-Optic, Ltd., 100 FCC 2d 1033 (1985) (policy on transatlantic fiber optic submarine cable systems).

[57] International Competitive Carrier Policies, 102 FCC 2d at 818-19, 823.

[58] In International Competitive Carrier Policies, the Commission defined a refiler as follows:

> A refiler provides a service in which traffic is carried from one point (*eg.*, the U.S.) to another (*e. g.*, the U.K.) and then placed (filed) into the second country's network for delivery within the second country or to additional overseas points. In a refiling situation the refiler may be a carrier or enhanced service provider for the first segment (U.S. to first overseas point) of the transmission and then is a customer of the overseas PTT for the second segment (first overseas point to second overseas point) of the transmission.

Id. at 827 n.35.

[59] *Id.* at 824 n.29, 826-27. While tariffed international services of AT&T and the IRCs historically offered to provide discrete types of either voice or data communications, combined voice and data transmission capabilities in a single network has been available over private line and other non-IMTS services.

[60] *Id.* at 826 n.31. TRT there had argued that the Commission's product market analysis was seriously flawed because TRT believed the use of IMTS for data transmissions made IMTS substitutable with non-IMTS services such as telex. *Id.* at 819, 825-26. TRT also argued that private line services should be placed in the IMTS market rather than the non-IMTS market. However, because it appeared that most international private line circuits were used for alternative voice/data (AVD) service, the Commission was not persuaded that private line offerings were closer substitutes for IMTS than for non-IMTS services. *Id.* at 825.

[61] Opposition to Petitions to Deny at 11.

[62] 102 FCC 2d at 833.

[63] *Id.*

[64] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) *quoting* United States v. E. I. du Pont de Nemours & Co., *supra*, 351 U.S. at 391; International Competitive Carrier Policies, *supra*, 102 FCC 2d at 829.

[65] United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974); United States v. Citizens National Bank, 422 U.S. 86, 120 (1975); *see* Xerox Corporation, 74 FCC 2d 471, 490 (1979).

[66] An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as "horizontal." Brown Shoe Co. v. United States, *supra*, 370 U.S. at 334. A horizontal acquisition is one firm's acquisition of the stock or assets of another firm

producing an identical product or close substitute and selling it in the same geographic market. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv L Rev 1313, 1315 (1965). Basically, it is the acquisition of a direct competitor.

[67] United States v. Continental Can Co., *supra*, 378 U.S. at 458.

[68] *Id.* ; Brown Shoe Co. v. United States, *supra*, 370 U.S. at 321.

[69] Southern Pacific Communications v. AT&T, *supra*, 740 F.2d at 1000.

[70] *See* Greenfield, *Beyond Herfindahl : Non - Structural Elements of Merger Analysis*, 53 Antitrust L.J. 229, 236-38.

[71] *Cf.*, Southern Pacific Communications Co. v. AT&T, 556 F. Supp. 825,824 (D.D.C. 1982) (as amended Jan. 10, 1983) (AT&T not found to possess monopoly power in market for private line services in light of pace of entry into the market by new specialized carriers including resale carriers), *aff' d*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). As the Applicants note (Opposition to Petitions to Deny at 31 n.30), the Department Guidelines were modified in 1984 in part to correct what the Department considered to be the public's misperception that the 1982 standards, including HHI, were a set of strict mathematical rules to be adhered to slavishly. 49 F.R. 26823, 26825 (June 29, 1984).

[72] TRT's analysis of non-IMTS revenues and market shares similarly is flawed because it also is based on only the limited record carrier data reported to the Commission. Such analyses accordingly fail to recognize the existence of other non-IMTS competitors and fail to reflect potential future competition from facsimile and enhanced service offerings.

[73] In *PPG Industries*, there appeared to be only three fully capable firms or strong competitors in the relevant product market and the proposed acquisition would have left but two. More significantly, the court found that such high market concentration would be prolonged because of the presence of high market-entry barriers. In contrast, the non-IMTS market is characterized by low market entry barriers and other options available or lying in the wings of this dynamic industry that is characterized by rapid and continuing technological changes. Unlike *PPG Industries*, there is no evidence that ITT Worldcom/Western Union and RCA Globcom/WUI "will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." 798 F.2d at 1503.

[74] International Competitive Carrier Policies, *supra*, 102 FCC 2d at 832-33.

[75] *See* "Trends in the International Communications Industry 1975 - 1986", Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, December 1987, at pp. 1, 13.

[76] Opposition to Petitions to Deny at 15.

[77] *Id.* at 16.

[78] "Trends in the International Communications Industry 1975-1976", *supra*, at 8.

[79] International Competitive Carrier Policies, *supra*, 102 FCC 2d at 833-34.

[80] *Id.* at 834.

[81] *Id.* at 833-34.

[82] Opposition to Petitions to Deny at 16-17.

[83] *Id.* at 17.

[84] The Applicants rely on a report by International Resource Development, Inc. (IRD) projecting the development of each of the major segments of the overall "electronic mail" market for the next decade. Such market includes both domestic and international telex and a variety of associated regulated and unregulated products. While IRD projects facsimile revenues to increase from $450 million in 1986 to $1,500 million by 1996, it projects telex revenues to decline by half or from $800 million to $400 million during the same period. Opposition to Petitions to Deny at 26.

[85] *Id.* at Attachment 10.

[86] *See* , *e. g.* ATX Corp., 2 FCC Rcd 4064 (1987) (resale of IMTS to provide international facsimile service between the United States and various countries authorized); Instafax International, Inc., Memorandum Opinion and Order, File No. I-T-C-84-081 (released July 3, 1984) (authority granted to resell IMTS to provide digital facsimile services to Hong Kong).

[87] 47 U.S.C. § 222(b)(1).

[88] More than five years ago, the United States Court of Appeals for the District of Columbia Circuit stated that the IRCs "are no longer an infant industry in special need of extraordinary protection . . . ." Western Union International, Inc. v. FCC, 673 F.2d 539, 543 (D.C. Cir. 1982).

[89] *See* Western Union Corporation, *supra*, (authorizing the merger of Western Union and ITT Worldcom).

[90] *Cf.* International Competitive Carrier Policies, *supra*, 102 FCC 2d at 837 (imposition of structural separation unnecessary with respect to AT&T's regulated and unregulated services and products "to prevent harm to other non-IMTS service providers because of the vigorous and established competition in the non-IMTS market.).

[91] *See* Uniform Settlement Rates, 84 FCC 2d 121, 127 (1980); Implementation and Scope of the Uniform Settlements Policy for Parallel International Routes, 51 Fed. Reg. 4736.

[92] 51 Fed. Reg. at ¶ 48, Attachment A.

[93] 47 C.F.R. §§ 1.711-1.735.

[94] International Settlements Policy Order, *supra*, 2 FCC Rcd at 1122.

[95] 95 FCC 2d at 555. *Cf.* Western Union Corporation, *supra*, 2 FCC Rcd at 6065 (conditions designed to extend extraordinary protections are not in the public interest).

[96] IT&E contends that the application should be denied because of an alleged "serious lack of candor by the parties." Petition to Deny at 5. In support thereof, IT&E alleges, *inter alia*, that the application incorrectly states that RCA Globcom was not found to be a dominant carrier with respect to IMTS service on Guam in International Competitive Carrier Policies, *supra*. This allegation is without merit. Applicants clearly indicated that RCA Globcom was a dominant carrier with respect to IMTS service for Guam. Application at 9 n.3.

[97] *See* note 27, *supra*.

[98] *See* note 35, *supra*.

[99] Cf. GTE Corporation & Southern Pacific Co., 94 FCC 2d 235, 258 (1983) (issues yet to be adjudicated by antitrust court are not bases for imposing conditions on transfer of control of an FCC carrier licensee).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCA GLOBAL COMMUNICATIONS, INC. — File No. I-T-C-87-175

Application for authority to acquire and operate the interests of Comsat Earth Stations, Inc. and MCI International, Inc. in the Pulantat, Guam international earth station and to offer earth station services under tariff to authorized users.

COMSAT EARTH STATIONS, INC. — File No. C-S-G-87-068-AL

Application for consent to assignment of Pulantat, Guam radio station license to RCA Global Communications, Inc.

MCI INTERNATIONAL, INC. — File No. C-S-G-88-021-AL

Application for consent to assignment of Pulantat, Guam radio station license to RCA Global Communications, Inc.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 5, 1988; Released: May 16, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 4, 1987, RCA Global Communications, Inc. (RCA) filed an application, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Section 721(c)(7), to acquire and operate the interests of Comsat Earth Stations, Inc. (CES)[1] and MCI International, Inc. (MCII) in the Pulantat, Guam international multi-purpose earth station and to offer earth station services under tariff to authorized users. On September 24, 1987 and February 5, 1988, respectively, CES[2] and MCII filed applications, pursuant to Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), for consent to assign to RCA their interests in the radio station license for the Pulantat, Guam earth station. The applications are unopposed. [3] For the reasons stated below we grant the applications.

II. BACKGROUND

2. The Communications Satellite Act of 1962 provides in Section 201(c)(7), 47 U.S.C. Section 721(c)(7), that the Commission is authorized to:

> grant appropriate authorizations for the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity. In determining the public interest, convenience, and necessity the Commission shall authorize the construction and operation of such stations by communications common carriers or the corporation, without preference to either.

Thus, the Commission is charged with the responsibility to determine the entities or groups of entities to be licensed to construct and operate multi-purpose earth stations, such as the Pulantat, Guam international earth station.

3. In view of this responsibility, and in anticipation of the scheduled launch of a second transatlantic service satellite, in December 1966 the Commission concluded that it should adopt a policy pursuant to which Comsat and the carriers then using earth stations to provide service would be authorized jointly to plan, construct, and/or operate the three initial stations and the three proposed additional stations.[4] The Commission required the joint owners to reach mutual agreement as to the exact functions of the joint ownership committee and to submit the agreement to the Commission in connection with any earth station application.[5] The joint owners entered into an Earth Station Ownership Agreement dated March 23, 1967, and filed the agreement with the Commission on April 19, 1967, concurrently with an application to construct the Etam, West Virginia earth station.[6]

4. In 1969, Comsat, RCA, Western Union International, Inc. (WUI)[7] and ITT World Communications, Inc. (ITT) agreed to construct and operate a seventh multi-purpose earth station, at Guam, and established the Guam Consortium of the ESOC.[8] In an order adopted August 20, 1969, the Commission authorized Comsat, RCA, WUI and ITT jointly to construct the Guam international earth station.[9]

5. In December 1984 the Commission, in its *Earth Station Modification Order*,[10] adopted a more liberal earth station ownership policy permitting U.S. international service carriers directly to own and operate international multi-purpose earth stations. The Commission concluded that a liberalized earth station ownership policy would benefit users by increasing carrier and service benefits and creating competitive pressures on rates. One of the central issues raised by the transition to a new competitive earth station ownership policy was the appropriate disposition of the ESOC earth station investments. The Commission permitted the ESOC owners to negotiate among themselves the future of the ESOC and then submit an agreement for Commission consideration. The Commission stated its expectation that any arrangements proposed by the ESOC

owners would be consistent with the antitrust laws and assure the continuation of efficient, high quality service without disruption at reasonable rates and with equitable access. It also anticipated that any settlement on the future of the ESOC would include some arrangement to minimize any economic injury to Comsat in its provision of earth station and space segment services because of a large scale diversion of traffic and revenue from the ESOC facilities to new multi-purpose earth stations.

6. The ESOC joint owners recently have submitted to the Commission a number of applications seeking to implement the dissolution of the ESOC. We have granted several of these filings to date.[11]

III. APPLICATIONS

7. The applications of RCA, MCII and CES are among the series of filings presented to the Commission by the ESOC joint owners in response to its *Earth Station Modification Order*.[12] The instant applications propose to transfer to RCA, which currently holds a 48.9 percent interest in the Pulantat, Guam earth station, the 50 percent and 1.1 percent interests held, respectively, by CES and MCII. RCA will acquire the interests at net book cost, and will offer the earth station services it provides through these facilities under tariff schedules filed with the Commission.

8. In support of its application, RCA states that it is technically, financially and legally qualified to own and operate the earth station. It advises that grant of its application will result in no change in the operation of the station, which currently is operated by RCA,[13] and will not affect Comsat's role as signatory to, and participant in, the INTELSAT global communications system. Moreover, RCA asserts, Commission grant of the negotiated arrangements for the future disposition of the Guam earth station interests will be in furtherance of the Commission's liberalized earth station ownership policy.[14]

IV. DISCUSSION

9. We find that RCA's acquisition of the CES and MCII interests in, and its continued operation of, the Pulantat, Guam multi-purpose earth station are in the public interest. RCA is a common carrier with well-established legal, technical and financial qualifications. RCA has participated as joint owner in the various consortia of the ESOC and, with respect to the Pulantat, Guam earth station, has held legal title and operated and maintained the facility on behalf of the Guam Consortium. Moreover, the Commission already has made public interest findings in support of the transactions set forth in the instant applications. In its 1985 decision in *Ownership and Operation of Guam Earth Station (Guam Order)*, [15] the Commission approved the agreement between Comsat and RCA to transfer Comsat's fifty percent interest in the Guam earth station to RCA concurrent with AT&T's purchase of Comsat's interests in certain of the earth stations in the Mainland Consortium of the ESOC.[16] The public interest findings of the *Guam Order* lay the foundation for the instant Section 214 and Title III applications. In the *Guam Order* the Commission found the proposed transfer to RCA of Comsat's Guam earth station interests to be in the public interest and consistent with the *Earth Station Modification Order*.[17] In its *Earth Station Modification Order* the Commission had stated its expectation that any negotiated arrangements as to the future of the ESOC facilities would be consistent with the antitrust laws and assure the continuation of efficient, high quality service without disruption at reasonable rates and with equitable access. In its *Guam Order* the Commission found that neither the transfer of Comsat's fifty percent interest to RCA nor the terms of the transfer presents a cognizable antitrust concern, and that the agreement to implement the transfer merely restructures the current ownership arrangement. The Commission also found that the continued operation of the Pulantat facilities by RCA will provide for continuation of efficient, high quality service without disruption to customers. Although noting that the agreement to implement the transfer did not indicate what future rates were likely to be, the Commission stated that RCA, as a common carrier, is required to provide service on terms which are just, reasonable and not unreasonably discriminatory. Finally, the Commission noted that Section 201(c)(2) of the Communications Satellite Act, 47 U.S.C. Section 721(c)(2), requires equitable access to earth station facilities. For these reasons, the Commission found the agreement between Comsat and RCA, which would result in RCA's ownership of 98.9 percent of the Pulantat, Guam earth station, to be in the public interest and consistent with the *Earth Station Modification Order*.

10. We determine here that these public interest findings also are applicable to RCA's acquisition of the additional 1.1 percent interest currently held by MCII. The decision of the joint owners to dissolve the Guam Consortium of ESOC in favor of RCA's ownership and operation of the Pulantat earth station assures, without disruption, continuation of efficient, high quality service to customers. The decision recognizes that, once the joint owners of the Mainland Consortium of the ESOC decided to transfer their interests in the Etam, Roaring Creek and Jamesburg facilities to AT&T,[18] the desirability of maintaining the joint ownership arrangements for other multi-purpose stations was eliminated. CES has advised that the joint ownership arrangements were based, among other factors, on the desirability of cost averaging among high and low volume stations and of applying a uniform global rate for multi-purpose earth station services.[19] The decision of the joint owners to dissolve the Guam Consortium also moots the Commission's concern about potential economic harm to Comsat in its provision to the public of space segment or earth station services should the ESOC continue and a large user[20] of an ESOC station elect to divert its substantial traffic and revenue to a new multi-purpose earth station.

11. Furthermore, RCA's acquisition of full interest in the Pulantat earth station, as set forth in the instant applications, neither presents any new antitrust concern nor denies any authorized carrier equitable access to the earth station. The applications before us merely seek to restructure the current ownership arrangements for the Pulantat multi-purpose earth station to provide for continued service to Guam after the dissolution of the ESOC. Under the revised arrangements, however, RCA clearly is dominant in its provision of multi-purpose earth station services on Guam.[21] Therefore, RCA will be required to provide cost support for the tariff filings, and interested persons will have the opportunity to comment on the tariff schedules and regulations before the tariff becomes effective, and to present any allegations that the tariff structure itself denies any authorized carrier equitable access.[22]

V. CONCLUSION/ORDERING CLAUSES

12. In conclusion, we find that the proposed arrangements are consistent with the policies set forth in the Commission's *Earth Station Modification Order* and meet the relevant statutory requirements.

13. Accordingly, IT IS CERTIFIED that the public interest, convenience and necessity require that RCA Global Communications, Inc. acquire the interests of Comsat Earth Stations, Inc. and MCI International, Inc. in the Pulantat, Guam multi-purpose earth station.

14. IT IS FURTHER ORDERED that the application of RCA Global Communications, Inc., File No. I-T-C-87-175, IS GRANTED, and RCA is authorized to acquire and operate the interests of Comsat Earth Stations, Inc. and MCI International, Inc. in the Pulantat, Guam multi-purpose international earth station and to offer earth station services under tariff to authorized users.

15. IT IS FURTHER ORDERED that the applications of Comsat Earth Stations, Inc., File No. C-S-G-87-068-AL, and MCI International, Inc., File No. C-S-G-88-021-AL, ARE GRANTED and the applicants are authorized to assign their interests in the radio station licenses for the Pulantat, Guam multi-purpose international earth station to RCA Global Communications, Inc.

16. The Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

17. This order is issued under Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. Section 0.291 (1985), and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] At the time RCA filed its application, the CES interests were held by Comsat International Communications, Inc. (CICI). On July 14, 1987, CICI applied for Commission consent to assign CICI's interests to CES, which, like CICI, is a wholly-owned subsidiary of Comsat. Comsat International Communications, Inc. and Comsat Earth Stations, Inc., ENF-87-20 (filed July 14, 1987). The sole purpose of CES is to operate Comsat's interests in the various multi-purpose earth stations until these stations are transferred to other entities. *Id.* at 4. We granted CICI's application in an order released November 16, 1987. Communications Satellite Corporation, 2 FCC Rcd 7202 (1987).

[2] The CES application originally was filed by CICI. *See supra* n. 1.

[3] On December 21, 1987, considerably after the close of the comment periods provided in the September 23, 1987 Public Notice announcing that RCA's application, File No. I-T-C-87-175, had been accepted for filing, and the October 7, 1987 Public Notice announcing that CES' application, File No. C-S-G-87-068-AL, had been accepted for filing, IT&E Overseas, Inc. (IT&E) advised that it had filed, in a separate proceeding, a petition to deny the applications seeking to transfer the control of RCA licenses and authorizations to MCI Communications Corporation, parent company of MCII. *See* FCC File No. ENF-88-1. IT&E's December 21, 1987 letter requested that its petition to deny and attachments thereto filed on December 11, 1987 in File No. ENF-88-1 be considered insofar as relevant as a petition to deny the instant application in File No. I-T-C-87-175. Letter from Victor J. Toth, Counsel for IT&E Overseas, Inc. (filed December 21, 1987). RCA responded to IT&E's letter, urging that we disregard the "untimely and duplicative" objection. Letter from Jeffrey Frackman, Senior Counsel, RCA (filed December 28, 1987). We agree with RCA that IT&E's filing is untimely in File No. I-T-C-87-175. It is Commission policy that extensions of time are not routinely granted, Section 1.46(a) of the Commission's Rules, 47 C.F.R. Section 1.46(a), and IT&E has failed to demonstrate why in this particular instance we should accept its untimely filing. IT&E also did not file a petition to deny the February 5, 1988 application of MCII in File No. C-S-G-88-021-AL.

[4] Second Report and Order, 5 F.C.C. 2d 812, 815-16 (1966). The three initial stations, at Andover, Maine, Brewster Flat, Washington and Paumalu, Hawaii, were at that time wholly owned and operated by Comsat pursuant to an interim policy set forth in the Commission's Report and Order, 38 F.C.C. 1104 (1965), which had centralized within Comsat responsibility for the design, construction and operation of the initial earth stations. The three additional stations were those to be located at Cayey, Puerto Rico, Etam, West Virginia and Jamesburg, California.

[5] 5 F.C.C. 2d at 820.

[6] *See* 8 F.C.C. 2d 406 (1967) (approving the application to construct the West Virginia facility). The 1967 agreement established the Earth Station Ownership Committee (ESOC), and provides for the ownership and operation of earth stations in several consortia, including the consortium for earth stations located on the U.S. Mainland, the Mainland Consortium. The Mainland Consortium at one time included six earth stations: Etam, Jamesburg and Roaring Creek, recently acquired by AT&T, American Telephone and Telegraph Company, File No. I-T-C-87-109, 2 FCC Rcd 6635 (1987); Brewster Flat, the retirement of which we authorized in Comsat International Communications, Inc., I-T-D-87-002, 2 FCC Rcd 1167 (1987); Andover, recently acquired by MCII, MCI International, Inc., File No. I-T-C-88-021, 3 FCC Rcd 6 (1987); and Lenox, which will continue to be operated by the ESOC until transferred to AT&T, *see* pending applications, File Nos. I-T-C-88-080 and C-S-G-88-027-AL. The remaining consortia established by the 1967 ESOC agreement were the Hawaii Consortium, the dissolution of which recently was approved by the Acting Chief, International Facilities Division, Comsat Earth Stations, Inc., File No. I-T-C-88-059, DA 88-407 (released March 29, 1988), and a Puerto Rico/Virgin Islands Consortium, which included the Cayey, Puerto Rico earth station until it was converted to domestic satellite use, *see* All America Cables and Radio, Inc., 74 F.C.C. 2d 149 (1979).

[7] WUI is a wholly-owned subsidiary of MCII.

[8] The agreement establishing the Guam Consortium provides that the Guam earth station is to be considered an "additional earth station" within the meaning of the 1967 ESOC agreement, and that the terms and conditions of the 1967 agreement will cover the establishment, operation and ownership of the Guam earth station except as modified by the 1969 agreement. Memorandum of Understanding at para. I.A. (July 9, 1969). In two significant respects the 1969 agreement modifies the arrangements for the ownership and operation of the earth stations as set forth in the 1967 agreement by providing that RCA, and not Comsat, is

responsible for operational functions at, and holds legal title to, the Guam earth station. *Id.* at paras. III. A., IV. A. 3. The 1969 agreement further provides that, unless the 1967 agreement is amended to include the Guam earth station, the Guam Consortium will consist solely of the signatories to the 1969 agreement. *Id.* at para. I. B.

[9] RCA Global Communications, Inc., 18 F.C.C. 2d 1037 (1969). The Commission accepted the allocation of ownership interests proposed by the applicants as consistent in principle with the ownership related to use formula set forth in the Commission's earth station ownership policy. *See* Second Report and Order, 5 F.C.C. 2d 812, 818 (1966), where the Commission found that the most logical and equitable formula for apportioning investment shares was one under which ownership was reasonably related to use. The initial apportionment of shares in the Guam earth station provided for ownership as follows: Comsat, 50 percent; RCA, 34 percent; ITT, 8 percent; and WUI, 8 percent. RCA Global Communications, Inc. at 1039. The Commission subsequently has reapportioned the ownership interests in the Pulantat, Guam earth station to reflect changes in usage. *See* RCA Global Communications, Inc., File No. I-S-P-82-004, Mimeo No. 2301 (released February 10, 1983) (approving RCA's purchase of ITT's eight percent interest). *See also* Earth Station Modification Order, 100 F.C.C. 2d 250, 288 (1984) (reallocating ownership shares in ESOC facilities based on then-current usage figures). The current ownership interests in the Guam earth station are as follows: CES (as subsidiary of Comsat), 50 percent; RCA, 48.9 percent; and MCII (as successor to WUI), 1.1 percent.

[10] 100 F.C.C. 2d 250 (1984).

[11] *See supra* n. 6.

[12] 100 F.C.C. 2d 250 (1984) (adopting more flexibile policy permitting carriers to own multi-purpose earth stations independent of ESOC). As noted, we have acted on several of these applications. *See supra* n. 6.

[13] *See supra* n. 8.

[14] *See* CES application, File No. C-S-G-87-068-AL (filed September 24, 1987) and MCII application, File No. C-S-G-88-021-AL (filed February 5, 1988) at Attachments 4. Attachment 4 to the CES application also includes the Commission's decision in Ownership and Operation of the Guam Earth Station, File No. I-S-P-85-001, FCC 85-484 (released September 11, 1985), which found the Comsat-RCA agreement to transfer Comsat's fifty percent interest to RCA to be in the public interest and consistent with the Commission's Earth Station Modification Order, 100 F.C.C. 2d 250 (1984).

[15] Ownership and Operation of Guam Earth Station, File No. I-S-P-85-001, FCC 85-484 (released September 11, 1985).

[16] In October 1987 we approved AT&T's acquisition of full interests in the Etam, Jamesburg and Roaring Creek earth stations. *See* American Telephone and Telegraph Company, 2 FCC Rcd 6635 (1987). AT&T consummated its purchase of these Mainland Consortium facilities on December 31, 1987. *See* March 14, 1988 letter from Shant Harootunian, Attorney, AT&T to Secretary, F.C.C.

[17] Guam Order at 3-4.

[18] *See* American Telephone and Telegraph Co., 2 FCC Rcd 6635 (1987).

[19] *See* CES Application and Report, File No. I-T-C-88-059 (filed December 18, 1987). With the dissolution of the Guam Consortium, the CES tariff that applies this uniform global rate no longer will be applicable to earth station services offered through the Pulantat facility. Rather, RCA will offer these services through its separate tariff filings. Our decision today does not prejudge any Commission action on those filings. For the purposes of this order, we believe it is sufficient to note that RCA, as a common carrier, is required to provide service on terms that are just, reasonable and not unreasonably discriminatory. Moreover, as a dominant carrier in its provision of multi-purpose earth station services on Guam, *see infra* at para. 11, RCA will have to provide cost support for its tariff filings and interested parties will have the opportunity to comment on the reasonableness of RCA's rates.

[20] RCA is a major user of the Guam facility. In its Earth Station Modification Order, 100 F.C.C. 2d 250 (1984), the Commission reallocated the ESOC ownership interests to reflect more closely changes in usage, and increased RCA's usage-based ownership share in the Guam earth station to 48.9 percent.

[21] In its International Competitive Carrier Policies, 102 F.C.C. 2d 812 (1985) *recon. denied* FCC 86-339 (released August 7, 1986), the Commission found Comsat, with its fifty percent ownership share in the ESOC earth stations and sole ownership of several offshore earth stations, to be dominant in the distinct product market of multi-purpose earth station services, including the services the ESOC provided through the Pulantat earth station. Noting the then-proposed transfer of certain of the ESOC earth stations to AT&T, the Commission decided to assess the issue of AT&T's dominance when considering the transfer application. It also required any application to initiate multi-purpose earth station services to include adequate information for the Commission to make a finding as to the issue of non-dominance. *Id.* at 832, 844-45. We subsequently found AT&T dominant in its provision of earth station services on the U.S. Mainland, American Telephone and Telegraph Company, 2 FCC Rcd 6635 (1987), and classified MTC and GTE Spacenet as dominant in their provision of earth station services to, respectively, the Northern Marianas and Hawaii, Micronesian Telecommunications Corporation, File No. I-T-C-88-043, DA 88-311 (released March 18, 1988) and GTE Spacenet Corporation, File No. C-S-G-88-008-P/L, DA 88-406 (released March 29, 1988). In its instant application RCA has provided no specific information as to the issue of non-dominance. We find that, although the effect of its acquisition of the CES and MCII interests will not be to lessen competition substantially, RCA, in its continued operation of the Pulantat earth station, faces no effective competition in its provision of earth station services on Guam and thus must be classified as dominant for these services.

[22] Moreover, the Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the Pulantat, Guam earth station. *See* infra at para. 16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters
for FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING COMMENTS

Adopted: May 9, 1988; Released: May 16, 1988

By the Chief, Mass Media Bureau:

1. On March 22, 1988, the Commission released a *Further Notice of Proposed Rule Making* (*Further Notice)* in the captioned matter.[1] In the *Further Notice*, the Commission proposes revised minimum distance separation requirements for FM broadcast stations on IF-related channels. Comments on the proposal were to be filed on or before May 13, 1988 and replies on or before May 31, 1988. On May 4, 1988, the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG) filed a motion requesting that the comment period be extended by 60 days.

2. In support of its request, EIA/CEG states that as of the morning of May 4, 1988, a relevant technical memorandum prepared by the Commission's laboratory[2] was neither in the Commission's docket file nor available from the Commission's copy contractor. EIA/CEG believes that review of this memorandum is essential for it to be able to file useful comments. EIA/CEG further states that the nature of the FM broadcast receiver industry is such that the review of technical data and the formulation of a consensus necessarily require communications with overseas parties. Thus, significantly more time is needed to prepare comments.

3. The Commission does not routinely grant extensions of time for filing comments in rule making proceedings. [3] In this case, however, we believe that the requested extension is justified. We fully intended to make the aforementioned technical memorandum available for reference to commenters in this proceeding, and we have taken steps to insure that a copy of it will be placed in the docket file for public inspection. Moreover, we believe that the comments of EIA/CEG, an organization that represents a major portion of the broadcast receiver industry, will be particularly valuable to us in reaching an appropriate technical decision to further the public interest.[4] Allowing additional time for EIA/CEG to collect comprehensive technical data from foreign as well as domestic sources will enhance the value of its expected filing. Good cause having been shown, we will grant the requested 60 day extension.

4. Accordingly, IT IS ORDERED That the Motion for Extension of Time submitted by the Consumer Electronics Group of the Electronic Industries Association IS GRANTED and that the dates for filing comments and replies ARE EXTENDED to **July 12, 1988,** and **July 27, 1988, respectively.**

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] *See* FCC 88-87, 3 FCC Rcd 1661 (1988).

[2] "Laboratory Test Results of the FM-IF Interference in Broadcast Receivers, Project EEB-86-8", OET Technical Memorandum, FCC/OET TM87-4, June 1987, by J. Ray Hallman and Kenneth R. Nichols. This report was referenced in footnote 7 of the *Further Notice*.

[3] *See* §1.46 of the Commission's rules (47 CFR 1.46).

[4] We specifically invited receiver manufacturersor organizations representing receiver manufacturers to submit data and/or test results supporting or opposing our proposal on technical grounds. *See Further Notice* at paragraph 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request by

SILVER KING	8330-B
BROADCASTING	C3-137
COMPANY[1]	

For Declaratory Ruling

STAFF RULING

Adopted: May 6, 1988; Released: May 6, 1988

By the Chief, Fairness/Political Programming Branch.

1. The Commission has before it a request for declaratory ruling, filed March 4, 1988, by Silver King Broadcasting Company (Silver King), which seeks a determination that "In Your Interest," a program produced by its owned and operated stations, is a "bona fide news interview program" exempt from the "equal opportunities" requirement of Section 315 of the Communications Act. (47 U.S.C. Section 315(a)(2)). We will grant the request and find that "In Your Interest" is a bona fide news interview program.

2. Silver King explains that "In Your Interest" is a 3 to 4 1/2 minute program, aired by its stations every hour of the broadcast day except Sunday mornings. Silver King states that the program presents discussions of newsworthy topics, particularly those of a local interest in the various station communities. Silver King describes the format generally as "featuring interviews with a guest or guests who have particular expertise with respect to the subject matter being discussed. Issues may be explored in a single program, or, more frequently, in a multi-part series of related programs." According to Silver King, "In Your Interest" was first produced in 1986 by television station WHSH, Marlborough, Massachusetts. Thereafter, as Silver King acquired additional stations, "In Your Interest" has been individually produced by each station featuring topics of interest to each station's community. The format is essentially identical at each station with variance only as to subject matter. Silver King notes that it intends to continue implementing the program on other stations it acquires in the future and requests that such segments also be considered exempt.

3. Silver King contends that "In Your Interest" has all of the elements required by the Commission to satisfy Congress' intent in enacting the news interview exemption: (1) "In Your Interest" has been regularly scheduled since October 3, 1986, when it first aired on WHSH; (2) each station is directly and solely responsible for the production and control of its version of "In Your Interest"; and (3) decisions concerning topics and questions are based on each station's reasonable good faith journalistic judgment of newsworthiness rather than an intention to advance any candidacy. Silver King explains that some interviews are not necessarily news-related, and that occasionally "man-on-the-street" interviews are conducted. No exemption is sought for these segments, but rather the exemption is sought only in connection with its "regularly scheduled" news interview segments.

DISCUSSION

4. In 1959, Congress, motivated by its desire to encourage increased news coverage of political campaign activity, amended Section 315 of the Communications Act to exempt from the equal opportunities provision appearances by legally qualified candidates during four categories of news programming.[2] Congress specified broad categories of news programming, leaving to the Commission the task of interpreting the legislative history in deciding whether particular programs fit within an exempt category. In determining if a program falls within the "bona fide news interview" exemption, the Commission has adhered to the explicit congressional intention that such programming be regularly scheduled, under the control of a licensee or network, with decisions regarding format, topics and participants made by the licensee or network based on newsworthiness, not an intention to enhance or harm any particular candidacy. [3] "In Your Interest" appears to satisfy these criteria.

5. Furthermore, the length of "In Your Interest" segments, 3 to 4 1/2 minutes, does not serve as an impediment to its status as an exempt news interview program. The legislative history is silent regarding whether Congress envisioned a minimum length of time as requisite for a "program." Nor does Commission precedent conflict with our determination that a 3 to 4 1/2 minute program, such as "In Your Interest" can be a bona fide news interview program. Finally, the Commission has granted exempt status to interview programs which occasionally air entertainment and other segments unrelated to current news events, as long as bona fide news interviews are broadcast on a regular basis.[4] Accordingly, for all the above reasons, appearances by legally qualified candidates for public office during news interview segments of "In Your Interest" aired by the stations listed in footnote 1, above, and by any other Silver King stations that similarly choose to air the program in the future,[5] shall be exempt from the obligations of Section 315.

6. Staff action is taken pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] According to the request, wholly-owned subsidiaries of Silver King are the licensees of television stations KHSC, Ontario, California; KHSH, Alvin, Texas; KHSX, Irving, Texas; WEHS, Aurora, Illinois; WHSE, Newark, New Jersey, and its satellite, WHSI, Smithtown, New York; WHSH, Marlborough, Massachusetts; WHSP, Vineland, New Jersey; WHSW, Baltimore, Maryland; and WQHS, Cleveland, Ohio. An additional subsidiary is permittee of

television station WBHS, Tampa, Florida, and another is proposed transferee of television station KPST, Vallejo, California (File No. BTCCT-861126KE).

[2] Section 315(a) of the Communications Act states, in pertinent part:

> Appearance by a legally qualified candidate on any -
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be a use of a broadcasting station within the meaning of this subsection.

[3] *See* H. Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959).

[4] *See Multimedia Entertainment* Inc., 56 RR 2d 143 (1984).

[5] *See* CBS, Inc. (American Parade), 55 RR 2d 864 (M. Med. Bur. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

In re Applications of	
KQED, INC.	**MM DOCKET NO. 85-396**
San Francisco, California	
For renewal of licenses of noncommercial stations	
KQED-FM	File Nos. BRED-237 BRED-800801ZS and BRED-830801WD
KQED-TV, and	File Nos. BRET-25 BRET-800801LQ and BRET-8003801LK
KQEC-TV	File Nos. BRET-203 and BRET-800801LV
KQED, INC.	**MM DOCKET NO. 84-567**
San Francisco, California	File No. BRET-830801LJ
For renewal of license of noncommercial educational station KQEC(TV), Channel 32, San Francisco, California	
MINORITY TELEVISION PROJECT	**MM DOCKET NO. 84-568** File No. BPET-831101KI
For a construction permit for a new noncommercial educational television station on Channel 32, San Francisco, California	

Appearances

James A. Treanor, III, John R. Feore, Jr., Todd D. Gray and *Corine M. Antley*, on behalf of KQED, Inc.; *B. T. Wade, Jr.*, on behalf of Minority Television Project, Inc., *David M. Rice* and *Robert T. Perry*, on behalf of California Public Broadcasting Forum; *Linda R. Figueroa*, on behalf of the Chief, Mass Media Bureau; and *David Honig, Grover Hankins* and *James Winston*, on behalf of the National Black Media Coalition, the National Association for the Advancement of Colored People and the National Association of Black Owned Broadcasters, respectively, *amici curiae*.

DECISION

Adopted: April 18, 1988; Released: May 16, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN. Board Chairman MARINO issuing separate statement.

Board Member BLUMENTHAL:

1. In this proceeding, KQED, Inc. (KQED) is seeking the grant of its 1983 renewal application for KQEC-TV, Channel 32 (KQEC), whereas Minority Television Project, Inc. (MTP) has filed a mutually exclusive application for that same facility. Also involved here are KQED's 1977 and 1980 renewal applications for KQEC-TV and for its other noncommercial educational Stations KQED-FM, 88.5 MHz, and KQED-TV, Channel 9. By way of background, the Commission originally granted without hearing the 1977 and 1980 renewal applications of KQED for all three stations over the objections of California Public Broadcasting Forum (Forum), the lead petitioner for a coalition of public interest groups. *KQED, Inc.*, 77 FCC 2d 973 (1980); *KQED, Inc.*, 88 FCC 2d 1159 (1982). Thereafter, the mutually exclusive KQED and MTP applications for Channel 32 were designated for hearing on an availability of funds issue against MTP and a noncommercial comparative issue. *Hearing Designation Order*, 49 Fed. Reg. 24073, published June 11, 1984. In the interim, however, Forum appealed the Commission's earlier actions and on January 11, 1985, the Court of Appeals reversed the Commission's renewal of KQEC's licenses for the 1977-1980 and 1980-1983 terms, and held that Forum's allegations of misrepresentation by the licensee warranted a hearing. *California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985). Accordingly, in a second hearing designation order, the Commission specified an issue to determine whether KQEC misrepresented its reasons for suspending the operations of Channel 32 from November 1979 through May 1980. The Commission also consolidated the remanded proceeding from the court involving KQEC's 1977 and 1980 renewals and its requisite qualifications to be a licensee and the 1983 comparative renewal proceeding for Channel 32. *Memorandum Opinion and Order*, 51 Fed. Reg. 3417, published January 27, 1986. Finally, presiding Administrative Law Judge James F. Tierney (ALJ) added issues against MTP to determine its "locus of control" and whether it was broadly representative of community groups; and, with respect to KQEC, he added a "meritorious programming" issue. *Memorandum Opinions and Orders*, FCC 86M-899, released March 7, 1986, and FCC 86M-1048, released March 24, 1986.[1]

2. In his *Initial Decision* (*I. D.*), FCC 86D-69, released January 16, 1987, the ALJ resolved the locus of control and community representativeness issues in MTP's favor, but disqualified MTP under the financial qualifications issue. As to KQEC, the ALJ concluded that the licensee had not misrepresented its reasons for deactivating Channel 32; nevertheless, he limited its renewals to thirty (30) months because it failed to meet the high standards of candor required of licensees. This proceeding is now before the Review Board on exceptions filed by Forum, MTP, and the Mass Media Bureau, and limited exceptions of KQEC. We have reviewed the *I. D.* in light of the exceptions and reply briefs, the oral arguments held July

10, 1987 and January 15, 1988,[2] and our examination of the record. Except as modified herein, the ALJ's findings of fact and conclusions of law are adopted. We reverse, however, the ALJ's ultimate disposition and conclude instead that KQEC has engaged in misrepresentations which disqualify it from further licenseeship of Channel 32, that MTP appears financially and otherwise qualified to operate that facility, and that KQED is otherwise granted renewal of the licenses of its other two stations.[3]

KQEC-Misrepresentation Issue

3. The factual issue all parties agree is at the heart of this proceeding is whether KQEC misrepresented its reasons for darkening Channel 32 from November 1979 through May 1980. In its remand opinion, the Court of Appeals summarized the dispute as follows:

> [Forum] alleged that KQED had taken KQEC-TV off the air for generalized budgetary reasons in December 1979, and that when it was deactivated in that month deactivation through August 1980 was contemplated. KQED, on the other hand, contended that KQEC-TV had been deactivated because of the extraordinary costs that operating it during the installation of the new equipment would have incurred -- additional costs which KQED could ill afford given its ongoing budgetary problems.

752 F.2d at 678. The court further explicated:

> The difference is over the particular type of budgetary constraints that caused the deactivation. And it is clear that the two versions conflict: [Forum] assert[s] that budgetary discussions about the deactivation of KQEC-TV contained no mention whatever that cost savings referred to the additional costs created by the equipment installation; KQED asserts that those additional costs were, in fact, what caused the budget-saving deactivation. [Forum] contend[s] that the deactivation was originally planned to extend until the end of the 1979-1980 fiscal year – a fact that indicates the connection with general budgetary concerns; KQED asserts that, as it told [the] FCC, it planned all along to reactivate KQEC-TV when the equipment installation was completed.

Id. at 678-79 (footnote omitted). In our view, the documentary and testimonial evidence very heavily support Forum's version of events.

A. Factual History and Analysis

4. Budgetary problems plagued KQEC-TV's operation almost from its inception.[4] Based on a showing of "unforeseen fiscal difficulties," and with Commission approval, KQEC-TV was permitted to go off the air in September 1972. In 1975, however, the Commission warned KQEC that it would no longer accept financial difficulties as justification for continued nonoperation of Channel 32, but thereafter extended the deadline for resumption of its operation to January 1977. *KQED, Inc.*, 58 FCC 2d 751 (1976); *KQED, Inc.* 57 FCC 2d 264, 268-269, n.8 (1975).[5] Anthony S. Tiano, a key figure in this proceeding, who is Chief Executive and Operating Officer for all three stations, and who became President and General Manager of KQED in August 1978, was specifically familiar with KQEC-TV's history and these 1975 and 1976 Commission orders. He also was aware of KQED's continuing financial difficulties which had persisted since KQEC-TV's return to the air in 1977, including a deficit of over one million dollars. (Tr. 807-808, 581-2; *I. D.*, paras. 26-27).

5. Tiano also believed that the television stations were technically obsolete and that new switcher equipment was required. (*I. D.*, paras. 39-40). Such equipment was ordered on April 9, 1979 with delivery expected by November 1, 1979. (*I. D.*, para. 41). Installation was planned for November 5 through December 7, 1979 (*I. D.* para. 53) during which time KQEC-TV would be taken off the air. (*I. D.* para. 59). In late October, KQEC learned that manufacturing delays would push back delivery several weeks, and in fact, no parts were delivered before the end of November. KQEC-TV went off the air as planned November 5, but returned to the air on December 8 for the annual December fundraising period and remained on the air for the remainder of that month. Further delivery problems were reported in December and the equipment "dribbled in over a period of several months" so that it was 75% delivered by late February. Final delivery occurred on April 18, 1980. KQEC-TV, which had gone off the air again on January 1, 1980, did not resume broadcasting until May 29, 1980. (*I. D.* paras. 61, 66, 81, 87-89).

6. During the period Channel 32 was off the air, KQEC, through counsel, wrote four letters to the Commission, all of which attributed the station's shutdown to the need for and delays in replacement of the switcher equipment. First, and most important, on November 2, 1979, KQEC wrote in pertinent part:

> On behalf of KQED, Inc., the Commission is hereby advised that noncommercial educational station KQEC(TV) will temporarily suspend its operation during the period from November 5 to December 7, 1979, inclusive.
>
> The suspension will enable a master routing switcher to be replaced. The switching system equipment for both KQED-TV and KQEC(TV) is part of the same routing system. The licensee cannot maintain a separate schedule for KQEC(TV) during this installation and will accomplish it so as not to interfere with the operation of KQED-TV, which has the larger audience.

(*I. D.*, para. 62). Thereafter, on December 27, 1979, KQEC wrote that "[s]ince suspending operation, the station has experienced some delays in the shipping of necessary equipment to complete the . . . installation" and "will be unable to return to the air prior to March 1, 1980". (Forum Exh. 6). On February 25, 1980, KQEC wrote that "[A] delay in the shipment . . . has continued, requiring a postponement of the resumption of operations" [until] "the last week in May." (*I. D.* para. 90). Finally, on April 22, 1980, KQEC, making reference to "technical problems" and "necessary repairs", stated that "resumption for KQEC (TV) . . . is estimated to be May 31." (*I. D.* para. 91). Individually and collectively, however, these missives paint a picture at sharp variance with the full circumstances pertaining at KQEC in the latter half of 1979. Those circumstances are as follows.

7. KQED's 1979 fiscal year ended on August 31, 1979 with a deficit of $200,000 and it projected an operating deficit of at least $500,000 for fiscal 1980 and perhaps as much as $1,000,000. In the fall of 1979, Tiano ordered his staff to study ways of reducing the deficit, including eliminating service on KQEC-TV. (*I. D.* para. 55) On October 19, 1979, he asked for a study of cost savings resulting from extending the KQEC-TV shutdown up to four months and within a week thereafter directed the senior staff to study what savings would be achieved by a deactivation for the last eight months of the fiscal year from January 1 through August 31, 1980. Staff memoranda and discussions from October 26, 1979 forward were based on an eight month deactivation commencing in January 1980. (Forum Exh. 17; Tr. 1089-1090). One staff memorandum dated November 8, 1979 referred to an eight month shutdown of KQEC-TV as "short-term". Various other staff memoranda estimating savings of as much as $137,000 in fiscal 1980 were submitted. All of the staff memoranda dealt with savings to be achieved by keeping KQEC-TV off the air, and none with the additional expense of keeping it on the air. Nor did they refer to equipment installation or delays. (*I. D.* paras. 56-57).

8. Tiano left for a month's vacation in mid-November 1979, leaving Jennifer Belt, KQED's Director of Administration and Chief Financial Officer, in charge of KQEC. While he was away, and pursuant to his instructions, the staff continued to study cost savings from deactivation of KQEC-TV for the rest of fiscal 1980. Proposed modifications in KQED's budget were prepared in November and December showing 1980 savings of $134,000 from shutdown of KQEC-TV. The notes taken at a senior staff meeting held on December 11 state: "32 in the works to go off 1/80 - as projected." Upon his return in mid-December Tiano, reviewed a staff memorandum proposing overall budget cuts of $500,000 as of January 1, 1980 and his own notes reflect savings of $134,000 for "Channel 32". (*I. D.* paras. 70-71).

9. On December 20, 1979, a critical meeting of KQED's Board of Directors took place. At this meeting, the directors formally adopted a resolution noting the necessity of temporarily deactivating KQEC-TV "for continued budgetary reasons" and they authorized a further study of whether the station should be reactivated or disposed of. (Forum Exh. 27, p. 3). Tiano had prepared the resolution *in advance* of the meeting, and it was adopted by the directors without substantial change. (*I. D.* para. 74). Significant also are the minutes of the December 20 directors meeting, which minutes nowhere reflect any mention by Tiano of the switcher replacement or of any extraordinary costs associated with operating KQEC-TV during the replacement process. Tiano testified, however, that technical matters were extensively discussed at the meeting; that he informed the directors that KQEC-TV would be off the air at least until March 1, 1980 in order to install switching equipment; and that he considered the directors' resolution as simply recognizing in the budget Channel 32 savings resulting from continued equipment delivery delays. (*I. D.* para. 75).

10. Tiano's version of the December 20, 1979 directors meeting is sharply contradicted by two other witnesses who attended the meeting. Henry Kroll, an active member of one of Forum's constituent organizations, attended the meeting as an observer and stated that KQEC management informed the directors that deactivating KQEC-TV for the rest of the fiscal year would save an estimated $140,000; that there was no discussion of any other reasons for deactivating Channel 32; and that there was no discussion of delays in completing the switcher installation or of the cost of operating KQEC-TV during the installation. (*I. D.* para. 77). Jennifer Belt attended the meeting in her official capacity as Director of Administration. She disputed Tiano's account of the meeting and testified that she would have remembered any discussion of a connection between the equipment replacement and the deactivation of KQEC-TV, because she participated in developing Tiano's proposal to the directors, including having attended a senior staff meeting a few days earlier, and that she knew the proposed deactivation of KQEC-TV was planned and presented *solely* as a deficit reduction action unrelated to the switcher replacement. Belt further testified that the minutes of the directors meeting were consistent with both her understanding and the directors action, as well as prior staff discussions which were " *financial* " and not " *technical* " in nature. (Tr. 1405, 1419, 1422-25; *I. D.* para. 78).

11. The effect of the December 20 directors' resolution was to approve taking KQEC-TV off the air through August 31, 1980 and to delete any further funding for the station for the rest of the fiscal year. (*I. D.* para. 79). On December 31, Tiano sent a memorandum to KQED division heads estimating an operating budget deficit of $562,000 and stating:

> At the December 20, 1979 Board of Directors' meeting, we received approval to deactivate Channel 32 for the remainder of 1980. If our budget picture changes for the better, we will reactivate it.

He projected a savings of $140,000 from KQEC-TV's deactivation, consistent with previous staff estimates, and made no reference to the equipment replacement. Jennifer Belt testified that Tiano's memorandum was consistent with her understanding of the directors' resolution and management policy regarding deactivating Channel 32. (Forum Exh. 44; *I. D.* para. 97). By January 4, 1980, Belt had begun incorporating the effect of Channel 32's deactivation into KQED's fiscal 1980 budget and in January 1980, KQED staff members exchanged memoranda on savings in electricity from Channel 32's shutdown through August 1980. (*I. D.* paras. 79, 99).

12. In this case, as in all cases involving misrepresentation, the question of witness credibility is present. It is therefore necessary, before addressing the evidence summarized above, to briefly review the controlling principles in this area. It is clear from precedent that the Review Board must give special deference to the ALJ's credibility findings, because only the trier of fact has had an opportunity to observe the witnesses while they are testifying. *Broadcast Assoc. of Colorado*, 104 FCC 2d 16, 19 (1986)(credibility findings of ALJ "entitled to great weight"). Absent extrinsic evidence to the contrary, the ALJ's judgment therefore merits great deference and, accordingly, his credibility determinations will be upheld unless his findings patently conflict with the other record evidence. *Telestar, Inc.*, 2 FCC Rcd 5, 12-13 (and cases cited therein) (Rev. Bd. 1987). Here the ALJ held that "all witnesses . . . were, in general demeanor and in- the-main, forthright . . . . [I]t was the witness Belt, a former principal of KQED, forthright, articulate and knowledgeable, wholly without interest or bias in the propositions at bar, however, who gave most telling and credible first-hand

observations, so to speak, of what events and circumstances occurred about and during the relevant time period under the issue." (*I. D.* para. 184). These findings will be accorded due weight herein.

13. The internal activities at KQEC described above at paras. 7-11 were not revealed in KQEC's contemporaneous reports to the Commission. Specifically, its November 2, 1979 letter referenced a need to suspend Channel 32's operation in order to replace a master routing switcher, but did not suggest the consuming and on-going financial dilemma then facing the licensee. By the fall of 1979, KQED had a substantial operating deficit and was projecting a much larger one for the fiscal year. Tiano had therefore ordered staff studies of potential savings from KQEC-TV's shutdown through August 1980; staff memoranda had been prepared on cost savings of an eight month shutdown; and in July 1979, Tiano had studied the prior Commission orders pertaining to KQEC-TV's previous darkening in the mid-1970's, and the Commission's express admonition to the licensee that financial difficulties could not continue to justify remaining off the air. Thus, the November 2 letter did not disclose Tiano's growing intention to shut the station for eight months because of budget problems or his apparent motivation to avoid Commission censure for deactivating again based on financial factors.

14. The November 2 letter also misstated the true facts when it claimed that the licensee could not maintain a separate schedule for Channel 32 during the equipment installation. In fact, Robert K. Diehl, KQED's Manager of Engineering Facilities, Eugene S. Zastrow, its Chief Engineer, and Tiano himself all testified that Channel 32 could have been kept on the air by purchasing a relatively simple switcher ranging from $5,000 to $15,000 in cost or renting one at $75 to $250 a day. (*I. D.* para. 51; Tr. 452, 454, 471-473, 1348, 1822). Although the signal quality might have been poor, it would have been no worse than that which had characterized KQED-TV and KQEC-TV for years. (*I. D.* para. 42; Tr. 745-746). Jennifer Belt agreed that Channel 32 could have maintained a separate schedule during the replacement process. (Tr. 1467, 1552). The staff did not study the cost of keeping the station on the air during the installation, however (Tr. 435, 455), and KQED considered Channel 32's operation its lowest priority, ranking below Channel 9, program production, KQED-FM, and *Focus* magazine, KQED's and KQEC's programming guide. (*I. D.* paras. 49-50; Tr. 696, 1363, 1404). The sum and substance of this evidence is that Channel 32 was taken off the air not for the reasons stated in KQED's November 2 letter to the Commission, but because of financial considerations and the fact that Channel 32 was the licensee's lowest priority.

15. Moreover, KQEC's December 27, 1979 letter to the Commission, representing only that delays in shipping the needed equipment would keep the station off the air until March 1, 1980, was also contrary to contemporaneous events at KQEC. That letter did not mention the budget problems, the staff memoranda on estimated savings from Channel 32's deactivation, or that Tiano had decided to take the station off the air for eight months. And, most significant, it made no reference at all to the resolution voted by KQED's Board of Directors - only one week earlier on December 20 - that Channel 32 be deactivated for "continued budgetary reasons." While Tiano considered the directors' resolution as merely reflecting the budgetary impact of the equipment installation delay, his account is contradicted by the contemporaneous minutes of the meeting as well as by the sworn testimony of Kroll and Belt. Tiano's testimony is therefore rejected as contrary to the more credible and corroborative record evidence. In this regard, it is also noteworthy that Tiano informed the senior staff on more than one occasion that equipment installation was a "good excuse" to give the Commission for Channel 32's anticipated shutdown. (Tr. 1426-1427, 1449-1451, 1459,1555-1556). While the ALJ liberally interpreted Tiano's expression literally to mean "to exonerate" or "free from blame" (*I. D.* para. 184), we are unable to agree with so innocent a reading in view of the strong record evidence reviewed above, particularly the fact that Channel 32 could have been kept on the air during installation of the new switcher and that Tiano had express notice from the Commission's earlier orders that a total shutdown for financial reasons was not - in Tiano's phrase - a "good excuse." This conclusion is also consistent with Jennifer Belt's understanding of Tiano's words (Tr. 1427), and clearly supports the compelling inference that the letters to the Commission were intended to avoid potential FCC sanction.[6]

16. After January 1, 1980, KQEC's pattern of communication to the Commission regarding Channel 32's shutdown was the same. On February 25, it wrote to the Commission that "a delay in the shipment of . . . the new equipment . . . has continued, requiring a postponement of the resumption of operations." There was still no mention of the December 20 directors' resolution, or the dire budgetary problems, or that Channel 32 had - as a matter of fact - *returned* to the air in December, but was then voluntarily deactivated again on January 1, 1980. In contrast to its letter, in an almost contemporaneous directors meeting held February 21, 1980, Tiano reported on Channel 32's deactivation in connection with budget and deficit problems, yet his report to the directors made absolutely no reference to the switcher installation. (Forum Exh. 39). Similarly, in its final communication to the Commission prior to returning Channel 32 to the air, KQEC wrote on April 22, 1980, again citing equipment delivery delays and the need to repair technical problems in the equipment. And, once again, nothing was disclosed about the decision to take the station off the air for eight months to alleviate budget problems.[7]

17. The only external acknowledgement of the Channel 32's deactivation during the period of the shutdown was made indirectly in response to a letter from Henry Kroll. That is, on January 18, 1980, Kroll wrote KQEC protesting the cancellation of Channel 32's programming. A copy of Kroll's letter was sent to the Commission (*I. D.* para. 84). KQEC counsel drafted a response, assisted by Tiano, and signed by Linda H. Clever, KQED's Board Chairman, as follows:

> KQEC was deactivated in November in order to allow installation of new equipment within the station. Due to a delay in the delivery of the equipment, it was necessary to extend the down-time.
>
> At our meeting in December, we authorized staff to leave Channel 32 off-the-air in order to save money. In no event is that expected to last longer than August 31, 1980.

This letter was also copied to the Commission. (*I. D.*, para. 85). Tiano testified that the letter was drafted to provide as little information as possible and to be consistent with KQEC's December 27, 1979 letter to the Commission. (Tr. 1067-1074). The comment "to save money," Tiano stated, referred only to a respite from operating expenses while the station remained off the air. (KQED Exh. 100 at 21-22).

B. ALJ's Conclusions, Exceptions, and Evaluation

18. After making extensive and detailed findings of fact (*I. D.*, paras. 11-106), the ALJ concluded that "there were coexisting reasons" for the darkening of KQEC-TV – budgetary problems and equipment problems – and that both should have been reported to the Commission under the "high standards of punctilio" imposed on broadcast licensees (citing *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980)). He further concluded that no misrepresentation occurred because the limited reasons for KQEC-TV's darkening reported to the Commission were literally true - so far as they went - and that lack of candor, which involved a duty of being completely honest, was not an issue in this proceeding. Nevertheless, because KQEC had not been entirely forthright and forthcoming in its "unedifying" communications to the Commission, the ALJ imposed a short-term renewal of thirty (30) months on each of its stations. (*I. D.* paras. 182, 184, 214-217, 220). While Forum, MTP, and the Mass Media Bureau all contend in their exceptions that KQEC-TV's deactivation was solely for budgetary reasons and that a conclusion of misrepresentation should have been reached, KQED submits that the ALJ erred in even finding "co-existing" reasons for Channel 32's darkening and it argues that the budgetary savings were merely a collateral effect of the shutdown, not the proximate cause. As indicated earlier, we disagree with both the ALJ's and KQEC's analyses.

19. KQEC contends that the ALJ's error in confusing cause and effect derives from two erroneous factual findings. The first, at *I. D.* para. 63, is the statement that Tiano had decided by the time of the November 2, 1979 letter to the Commission to deactivate KQEC-TV for eight months, thereby implying that a decision based on budgetary reasons had been made prior to the shutdown for equipment reasons. (KQEC Br. at 9-13). The second alleged error was the ALJ's interpretation (at *I. D.* para. 79) of the effect of the December 20, 1979 directors resolution as authorizing taking KQEC-TV off the air through August 1980, deleting further funding for it for the fiscal year, and necessitating further formal action before it could be reactivated. (KQEC Br. at 14-16).[8]

20. Contrary to KQEC's first point, there is clear demonstrative evidence that Tiano's decision to deactivate Channel 32 was made prior to the November 2 letter. Forum introduced into evidence a copy of the December 1979 issue of *Focus* magazine, the monthly program guide, which contained program listings for its two television stations (KQED-TV and KQEC-TV) from December 1, 1979 through January 3, 1980. (Forum Exh. 60). Although programming is listed for *both* Channel 9 and Channel 32 through the end of December, 1979, *all* routine listings for Channel 32 are inexplicably *dropped* on the January, 1980 dates. (*Id.* at 64-65). Given that *Focus* program listings go to press three weeks before mailing to subscribers, and that the December 1979 *Focus* issue would have reached its audience sometime in November 1979 (Tr. 322-323, 328, 384-388, 394), a decision to drop the Channel 32 listings altogether after December 31. 1979 had to be made considerably earlier – certainly by late October, 1979. Therefore, the ALJ's finding has specific record support. KQEC introduced no evidence in rebuttal to otherwise explain the total absence of January, 1980 program listings for Channel 32. At the January 15, 1988 oral argument, held in part to further explore this specific point, counsel for KQEC distributed a "Channel 32 Schedule" for January 1-3, which he constructed on the basis of two bits of information. (Tr. 2472). First, counsel noted that elsewhere in the program guide for December the repeat schedule listing indicates that one program - *Yoga for Health* - will not be repeated December 24 and January 1, which it is suggested, would not have been mentioned had no listings at all for January been contemplated. (Forum Exh. 60, pp. 48-49; tr. 2475-6). Counsel further pointed out that the January 1980 *Focus* magazine contains a listing of children's programs for Channel 32 for that month which would seem to contradict the absence of Channel 32 listings in the December *Focus* issue. (Focus Exh. 61, p. 63; tr. 2477-2478). This is a proposition, however, based solely on counsel's interpretation of the data, rather than on inferences drawn from record evidence introduced by KQEC to explain why the routine Channel 32 program listings for January, 1980 were inexplicably deleted. In fact, counsel readily admitted he did not know what the information regarding the repeat and children's listings meant and could only surmise.[9] These two bits of data, whatever their meaning, seem to us far less probative than the sudden - and otherwise unexplained - elimination of *all* Channel 32 programs from the detailed daily program listings as of January 1 in the December *Focus*. When considered in the context of the other evidence summarized earlier pertaining to KQED's financial preoccupation in October 1979 (*see* para. 7, *supra),* the total absence of January 1980 program listings for Channel 32 in the December 1979 issue of *Focus* is, if not a smoking gun, strong circumstantial evidence that permits of virtually no explanation other than that, by early November 1979, the licensee had absolutely no plans to operate Channel 32 beyond the 1979 calendar year. The die had been cast against Channel 32 long before 1979 had ended.

21. KQEC's contention that the December 20, 1979 directors resolution did not cause Channel 32's deactivation, as the ALJ found, is based largely on Tiano's testimony that the purpose of the resolution was to take advantage of the cost savings resulting from Channel 32's darkening during the equipment replacement process. Tiano's testimony, however, as noted earlier at para. 10, was completely uncorroborated, and, in fact, directly contradicted by the contemporaneous minutes taken of the meeting, by Henry Kroll, who attended the Board meeting, and by Jennifer Belt, the witness found by the ALJ to be most credible. And, as Tiano's replacement during his absence, Belt was the licensee official in the best position to know the true facts. While KQEC relies on Linda Clever's letter to Kroll explaining the directors resolution (Br. at 14-15), this letter was actually written a month-and-a-half later on February 4, 1980, and was copied to the Commission only *after* Kroll disclosed the licensee's decision of December 20 in his letter of complaint, which was also sent to the Commission. Certainly, in the critical four letters voluntarily submitted to the Commission during the period of Channel 32's shutdown, KQEC made no disclosure that it was primarily seeking to save money

during the equipment delays, but steadfastly maintained that equipment problems alone motivated the deactivation. Its directive of December 20 reflects the real basis for the shut-down of Channel 32; the equipment situation was merely a minor contributing factor in the licensee's actions – in essence, a convenient smokescreen.

22. Nevertheless, the ALJ concluded that KQEC had not engaged in deliberate misrepresentation because its communications to the Commission, while lacking in forthrightness regarding its financial problems, were truthful in that equipment changes also occurred during the period of the correspondence. Buttressing his conclusions were the findings that, as early as July 1978, KQED decided that $425,000 could be allocated for a new master switcher, that installation was originally planned for November-December 1979, but was postponed principally due to untimely deliveries of equipment, and that once delivery was made and installation accomplished KQEC-TV returned to the air by May 31, 1980. (*I. D.* para. 175). There is no question that KQEC experienced an equipment problem in 1979 and that it suffered delays in installing its new switcher during the period in question. However, we must agree with Forum that it was the supervening occurrence of a severe budget crisis that preoccupied the licensee and motivated it to deactivate Channel 32. With the sole exception of the testimony of Anthony Tiano, the great preponderance of testimonial and documentary evidence supports this inescapable conclusion. Specifically, staff memoranda from October 26, 1979 onward focused on an eight month deactivation of KQEC-TV in order to reduce the fiscal 1980 budget deficit; the December 20, 1979 directors resolution formalized Tiano's plan to take Channel 32 off the air through August 1980 in order to save approximately $140,000; the minutes of the December 20 meeting contain absolutely no mention by Tiano of "equipment problems" in connection with the shutdown; the testimony of Henry Kroll and Jennifer Belt aver that there was no discussion at the meeting of delay in completing the equipment installation as a reason for deactivation; the December 31, 1979 memorandum from Tiano to KQED management confirmed that the December 20 action approved the shutdown of Channel 32 to the end of the fiscal year and projected a $140,000 savings as a result; and Jennifer Belt testified that Tiano's memorandum comported with her understanding of the December 20 Board action and with management policy. And, finally, the telltale December issue of *Focus* - with its absence of any routine January 1980 program listings for Channel 32 - attests to the fact that the decision to deactivate Channel 32 was made independent of the equipment situation and long before significant "delivery problems" could have been foreseen. By falsely reporting to the Commission reasons other than those that were actually motivating the deactivation of Channel 32, KQEC plainly engaged in a willful and knowing misrepresentation.[10]

23. Forum, MTP, and the Mass Media Bureau all take exception to the ALJ's finding that lack of candor was "not an issue at bar" (*I. D.*, para. 214), and that such an issue had to be specifically designated to be the basis for sanction. (Forum Br. at 23-25, MTP Br. at 13-14, Bureau Br. at 12-13).[11] We generally agree with the thrust of these contentions. To begin with, the inquiry contemplated by both the court and the Commission was a broad one. In remanding, the court expressly disapproved of the Commission's previous treatment of Forum's charges and ruled that it was arbitrary and capricious for the Commission to require a more specific showing by Forum of deceptive intent where KQEC had the only access to certain relevant facts; it also held that Forum's documentation adequately raised the question of the truthfulness of KQED's explanations.[12] In response to the Commission's request to the parties to file comments on how it should proceed following the remand,[13] Forum submitted that the issue should determine whether KQEC "concealed from or misrepresented to" the Commission "the causes and reasons for the darkening of KQEC-TV",[14] whereas KQEC suggested that the hearing determine whether KQED "materially and intentionally misrepresented . . . that the shutdown . . . was due to the installation of new equipment."[15] The Commission saw no serious difference in these formulations: "Although KQED, Forum, and the Bureau propose somewhat different language for the issue to be designated, they essentially agree as to the scope of the issue. Thus we need not belabor the choice of language."[16]

24. Secondly, however phrased, the essence of the issue designated here is whether the licensee engaged in deceitful conduct. In *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), the Commission, in ruling that the distinction between misrepresentation and lack of candor should not be overstated, held that:

> Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form. [Footnote omitted].

Both infractions include the element of deceptive intent. (*Id.*) The reliability of an applicant and its proclivity to deal truthfully with the Commission is a bedrock prerequisite to a finding of basic character qualification to hold a license. *Character Policy Statement*, 102 FCC 2d 1179, 1188-1191 (1986). Clearly, the essence of the issue designated in this case is whether KQEC attempted to deceive the Commission regarding Channel 32's deactivation. Thus, insofar as the ALJ concluded he could not disqualify KQEC because the words "lack of candor" were not expressly incorporated into the issue's wording, he erred.[17]

25. Historically, as well as currently, the Commission has considered the twin elements of truthfulness and reliability as fundamental character traits necessary to operate a broadcast station in the public interest. The Commission seeks to determine whether the licensee before it is likely to be forthright in its relations with the agency in the future. Thus, misrepresentation and lack of candor in an applicant's dealings with the Commission are serious breaches of trust and undermine the integrity of our processes. *Character Policy Statement, supra*, at 1208-1211. As such, even the most insignificant misrepresentations may be treated as disqualifying. *FCC v. WOKO*, 329 U.S. 223, 227 (1946); *see also Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461-62 (D.C. Cir. 1980). In treating misrepresentation in a given case, however, the Commission may consider mitigating circumstances and has broad authority in fashioning remedies and sanctions. *Character Policy Statement, supra* at 1211; *Janus Broad-*

casting Co., 78 FCC 2d 788, 792-93 (1980), *Walton Broadcasting, Inc.*, 78 FCC 2d 857, 868 n.17, *recon. denied*, 83 FCC 2d 440 (1980), *aff'd without opinion*, D.C. Cir. Case No. 81-1027, decided May 28, 1982. Here, we have concluded that KQEC actively and intentionally attempted to deceive the Commission by representing that its primary reasons for deactivating Channel 32 were other than those involving its budgetary problems.[18] Before turning to the ultimate question of what sanction is appropriate, we must consider arguments of "meritorious programming" offered by the licensee in mitigation.

C. Meritorious Programming

26. The ALJ specified an issue to determine whether the programming of KQED's three stations, through the end of the last completed license term, has been meritorious, and would thus mitigate any adverse conclusions under the misrepresentation issue. He concluded that the stations' programming had been meritorious, but was not mitigating because there was no misrepresentation to offset (*I. D.*, para. 185), and also was not mitigating of the sanction imposed by the ALJ of a short term renewal because "it is grounded in and compelled by the inchoate, pervasive and preeminent duty of a licensee/trustee or fiduciary which has been found wanting, not unlike a putative act of non-feasance." (*I. D.*, para. 218.) Forum, MTP, and the Mass Media Bureau all contend that meritorious programming evidence may not be used to mitigate findings of misrepresentation and that, in any event, the subject programming was not "sufficiently" meritorious to mitigate the misconduct. (Forum Br. at 26-39, MTP Br. at 14-17, Bureau Br. at 14-16). KQEC, of course, argues precisely the opposite. (Br. at 21-24.) We need not review the extensive findings of programming evidence compiled by the ALJ (*I. D.*, paras. 108-145), because we conclude, as a matter of law, that these findings cannot mitigate the particular misconduct on this record.

27. Traditionally, the Commission has permitted applicants to offer evidence of meritorious programming to mitigate findings on certain issues that are potentially disqualifying. The Commission has considered such evidence on the theory that the public interest is better served if the evaluation of an applicant's fitness to continue as a licensee includes consideration of favorable traits as well as deficiencies. For instance, in *Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423 (1980), perhaps the leading recent case in this area, mitigating evidence was received where the licensee had engaged, *inter alia*, in abdication of programming control, promotion of a lottery, misleading advertising, and improper logging. *See also, e. g., Federal Broadcasting System, Inc.*, 70 FCC 2d 55 (Rev. Bd. 1976) (EEO violations); *Trustees of the University of Pennsylvania*, 58 FCC 2d 848 (Rev. Bd. 1976) (adequacy of control of station operations); and *Voice of Charlotte Broadcasting Co.*, 58 FCC 2d 991 (Rev. Bd. 1976) (technical violations). The Commission expressly stated in *Cosmopolitan*, *supra*, however, at 425 n.3, that: "Some forms of misconduct (*e. g.*, misrepresentation, bribery, fraudulent billing) are *prima facie* so serious that a grant would not be in the public interest, no matter how meritorious the applicant's past programming record, and in such cases the Commission will not even consider programming evidence as a mitigating factor." *Accord Immaculate Conception Church v. FCC*, 320 F.2d 799 (D.C. Cir.), *cert. denied*, 375 U.S. 904 (1963); *United Broadcasting Co.*, 60 FCC 2d 816 (1976); *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973). KQED itself concedes (Br. at 23) that in cases involving "intentional wrongdoing" or "moral turpitude," the Commission refuses to consider evidence of "meritorious programming". In this case, involving as it does a clear issue of misrepresentation, there is little question that we are bound by *Cosmopolitan* and its antecedents, and therefore conclude that it was error for the ALJ to permit programming evidence in mitigation of KQED's intentional misrepresentations.

28. Nevertheless, the ALJ and KQEC both rely on a single case precedent to support their position to the contrary, *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). This case does not, in our view, represent a change in the Commission's traditional policy in this area. In *RKO General*, a case conceded by all concerned to be unique and unprecedented (*id.* at 235), the Commission denied RKO's renewal applications for its television stations in Boston, New York, and Los Angeles on several grounds, but the court of appeals affirmed only the Boston result, because of the licensee's lack of candor in that specific proceeding. The court then remanded the New York and Los Angeles proceedings, holding that the other renewals there could not be denied simply because they were conditioned on the outcome of the Boston case. Noting that the Commission, in designating for hearing RKO's thirteen other broadcast stations, permitted the licensee to introduce meritorious programming or other mitigating evidence with regard to those stations,[19] the court stated that "each of RKO's renewal applications arises in different contexts and presents different levels of complexity," and that "individual stations have different broadcast histories and policies," and are thus entitled to argue that they deserve different treatment than RKO's Boston station. *Id.* at 236-237. We note first, contrary to KQEC's position, that this language seems to go beyond the impact, *vel non*, of "meritorious programming" evidence to address the ultimate question of sanctions and remedies which, as the Court recognized, is a matter in which the Commission has "broad latitude." *Id.* at 237. Furthermore, in this regard, it is important to observe that RKO's Boston license had already been denied and that the Commission and court were addressing what impact this finding should have on RKO's *other* stations, particularly in view of their separate histories.[20] At minimum, then, KQED may not rely on *RKO General* to support the introduction of programming evidence to mitigate a finding of misrepresentation involving KQEC-TV. Moreover, unlike the special factual circumstances involving RKO's disparate holdings and separate and distinct operations, KQED's three stations are co-located with the same management, and substantially the same policies and practices. In particular, Channel 32 and Channel 9 operate as fully integrated, complementary television services. (KQED Exh. 14, p. 1; *I. D.* para. 14). Finally, and most important, in its recent *Character Policy Statement*, *supra*, at 1211 n.79, the Commission reiterated its traditional view that "in cases of misrepresentation we are not required to consider the station's past program performance." This *Policy Statement*, which both postdates the *RKO General* decision by several years and specifically addresses problems arising in that unusual proceeding, confirms the Commission's belief that, in cases such as the one at bar, "meritorious programming" evidence is inappropriate, and we therefore adhere to this view. We turn now to the final question of what sanction is required in this case.

D. Sanction

29. At the January 15, 1988 oral argument, the parties were requested to file supplemental briefs addressing the question of whether a finding of misrepresentation would require denial of all three of KQED's broadcast licenses (Tr. 2511-2512):

> [I]f [the Review Board] find[s] actionable misrepresentation on the part of KQE[D], Inc., [is it] then bound by operation of law or by precedent to not renew both Channel 9 and Channel 32 and, by extension, the FM station?

KQED and the Mass Media Bureau filed responsive briefs on February 1, 1988 and replies were filed by KQED and Forum on February 17 and 19, respectively.

30. The Mass Media Bureau, supported by Forum, is of the view that "KQED is guilty of misconduct so fundamental to a licensee's character that it affects its qualifications to hold any station license" and that therefore all three renewal applications should be denied. (Br. at 6-7). The Bureau states, citing *RKO General, Inc. v. FCC*, *supra*, that lack of candor is the kind of licensee misconduct whose seriousness affects its qualifications to hold any license. The Bureau also relies on *Star Stations of Indiana, Inc.*, 51 FCC 2d 95, *aff' d sub nom. Star Broadcasting, Inc. v. FCC*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) and *Alabama Educational Television Commission*, 50 FCC 2d 461 (1975), as examples of cases where misconduct was so fundamental that broadcasters were utterly disqualified from licenseeship of all of their stations.

31. KQEC, on the other hand, argues that Commission precedent establishes that its licenses are severable and that the Commission has broad discretion in choosing appropriate sanctions in a given case. Relying on the *Character Policy Statement*, *supra*, and *RKO General, Inc.*, *supra*, KQEC maintains "that individual stations of a multiple station owner must be judged separately." (Br. at 17). It also cites *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied sub nom. WWIZ, Inc. v. FCC*, 383 U.S. 967 (1966), among other cases, where the Commission denied a group owner's license for one station while renewing its other stations. It argues that the conduct of record in this case was limited to the operation of one station during a discrete period of time, and is an isolated incident in KQED's 35 year history of outstanding public service.

32. Forum replies that the misrepresentation in this case is not an isolated event, but a still-continuing course of behavior over a ten year period in that the licensee continues to cover-up the reasons for KQEC-TV's deactivation in 1979 and 1980. In these circumstances, Forum submits, all of KQED's license renewal applications must be denied. KQED replies that the Bureau " has lost all sense of perspective" and unfairly "lump[ed it] with the worst miscreants in FCC history." (Reply Br. at 1-2). It maintains that the misconduct in the cases relied on by the Bureau is not parallel to anything found in the record in this case and that KQED's voluntary and truthful reporting to the Commission should not result in having its licenses taken away.

33. The Commission, of course, has broad discretion in its choice of remedies and sanctions in the area of misrepresentation and lack of candor, and will accordingly consider all the facts of a given case before deciding as to the appropriate disposition. *Character Policy Statement*, *supra*, at 1210- 1211; *RKO General, Inc. v. FCC*, *supra*, at 237; *Leflore Broadcasting Co. v. FCC*, *supra*, at 463; *Lorain Journal Co. v. FCC*, *supra*, at 831. In determining the weight to be accorded specific acts of misconduct, the Commission has traditionally considered the wilfulness, frequency, and currency of the behavior, as well as its seriousness, the participation of station managers and owners, and other relevant factors. *Character Policy Statement*, *supra*, at 1227-1228. The Commission's purpose in making character evaluations is not to punish misconduct, but to assure that those granted licenses will be truthful in their dealings with the Commission and reliable station operators. *Id.*, *RKO General, Inc. v. FCC*, *supra*, at 232; *FCC v. WOKO, Inc.*, *supra*, at 228. Of necessity, the Commission relies heavily on the truthfulness, accuracy, and completeness of submissions made to it by applicants who, in turn, have an affirmative obligation to provide the Commission with the facts needed to carry out its statutory mandate. *Sea Island Broadcasting Corp. v. FCC*, 627 F. 2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980); *RKO General, Inc. v. FCC*, *supra*, at 232. As the Commission has said, "no one is allowed 'one bite' at the apple of deceit." *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973). Of course, these general precepts must be fleshed out and judiciously applied in individual cases.

34. The Commission has also recently clarified its policies regarding the particular problem presented in this case, that is, what effect a finding of misconduct at one station should have on other commonly-owned stations. Specifically, the Commission rejects the presumption, apparently favored by the Mass Media Bureau in this case, that misconduct at one station is necessarily predictive of the operation of the licensee's other stations. While some conduct may be so basic to a licensee's operation that it is relevant to its qualifications to hold any license, that is a factual determination to be made in individual cases. Proper operation of its other stations is itself evidence of a licensee's capacity to operate in the public interest. *Character Policy Statement*, *supra*, at 1220-1224. "Suffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct. Only in the most egregious case need termination of all rights be considered." *Id.*, at 1228.

35. Returning to the facts of the case at bar with these general principles in mind, we have found that the record in this proceeding reflects that, in its communications to the Commission, KQEC did not merely fail to state the full facts, its letters were affirmatively misleading. That is, KQEC reported developments pertaining to its delayed equipment installation which, however technically accurate, were, in the ALJ's words, "hardly edifying." KQEC's representations revealed no aspect of the financial concerns which were the transcendent preoccupation of the licensee, and it was those financial concerns which the record unmistakably establishes as the motivating factors in Channel 32's shut-down. In other words, while there is evidence, as chronicled by the ALJ, of equipment problems during the period of KQEC-TV's darkening, and reported as such to the Commission, the great preponderance of the record evidence confirms that vital financial considerations, *deliberately not reported*, were at the heart

of the decision to remove Channel 32 from the air. The wilfulness of the licensee's behavior, the involvement of its top management in the person of Mr. Tiano, and the seriousness of its decision to eliminate service on KQEC-TV over a six month period for reasons other than those reported to the Commission, constrain us to conclude that the licensee's conduct should result in denial of its renewal application for KQEC-TV. On the other hand, and without taking account of programming evidence, there is no indication whatever in the record that KQED- TV and KQED-FM have ever engaged in, or been the subject of, comparable misconduct. The licensee's operation of these two stations is not the subject of any specific complaint here, nor is there reason to believe from the record before us that the licensee has similarly misinformed the Commission on the status of those two stations or would be inclined to repeat its misconduct with regard to those stations. Indeed, the record supports a conclusion that the imperative priority placed on the operation of these stations would, and did, lead the licensee to keep them on the air, despite its deep financial troubles throughout the 1970's. And there is no record basis to predict that this dedication would diminish in the future. The evidently greater devotion with which the licensee has treated KQED-TV and KQED-FM may also derive from the fact that they have been broadcasting and providing public service longer than KQEC-TV (KQED-TV from 1954 and KQED-FM from 1969) and the fact that KQED was the first licensee of its kind to develop public broadcast station "members," the first to air a daily news show, to cover local issues live, and to produce local programs having national appeal. (*I. D.* paras. 13-14). Thus, in a broad sense at least, the misconduct here was "isolated" in that it pertained exclusively to Channel 32, without impact on the operation of the others and, as such, it is fitting that the sanction of non-renewal should apply to KQEC-TV alone. *Cf. Gross Telecasting, Inc*, 92 FCC 2d 204, 243-246 (Rev. Bd. 1982), *rev. denied*, FCC 83-443, released November 21, 1983.

36. Moreover, the precedent cited by the parties before us lends further support for our conclusion that this is not the kind of "egregious case" for which the Commission reserves the ultimate sanction of removal of all licensee rights. *RKO General, Inc. v. FCC*, *supra*, relied on by the Bureau, clearly stands for the proposition that even a record of serious lack of candor will necessarily terminate only licensee rights in the proceeding in which it occurred, and will not dictate automatic non-renewal of corporately co-owned stations. *Star Stations*, also relied on by the Bureau, is hardly apposite. That case involved "pervasive and continuing" misconduct in the operation of the licensee stations involving improper campaign contributions, slanted news broadcasts, and misrepresentations in addition to deliberate attempts to frustrate the Commission's processes by intimidating and harassing employees and former employees, in short a "reprehensible course of misconduct" destroying any confidence of the licensee's ability or willingness to minimally comply with the public interest. *Id.*, at 97, 109. Likewise, we are also cited to *Alabama Educational Television Commission*, *supra*, another case with no apparent parallel to this proceeding, where all licenses were denied because the licensee followed a conscious policy of racial discrimination in its overall programming so as to pervasively neglect a black minority which consisted of approximately thirty percent of the population of Alabama. *Id.*, at 477. On the other hand, in *KFPW Broadcasting Co.*, 47 FCC 2d 1090 (1974), where a licensee made secret payments to network officials solely to help obtain improved network affiliation agreements, the Commission denied renewal of only the station at which the misconduct occurred, but it renewed the licensee's other station because of the absence of evidence of misconduct there and the unlikelihood that the misconduct would be repeated. *Id.* at 1092-1096. Similarly, in *Lorain Journal* Co. v. FCC, supra, where a licensee engaged in an unauthorized transfer of control of a broadcast station and also filed misinformation and withheld information from the Commission in that regard, in addition to engaging in technical violations and fictitious logging at the station, the Commission's sanction of nonrenewal did not extend to a co-owned station apparently uninvolved in the misconduct. Id. at 826, 830-831. *See also Faulkner Radio, Inc.*, 88 FCC 2d 612, 616-618 (1981) "isolated context" of misconduct, albeit involving a strike petition and misrepresentations, contributes to limiting nonrenewal to single station); *United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1585 (1985) (renewal granted station having record "without significant blemish" despite non-renewal of other co-owned stations because of past misconduct); *WI00, Inc.*, 95 FCC 2d 974, 979-980, 983-984 (1983) (past disqualification based on submission of false jurats and improper investigatory tactics does not extend to co-owned station where misconduct was limited to prior proceeding and was not repeated). We cannot say that the misconduct in the present record exceeds that reported in these renewal cases or warrants any greater sanction.

37. In short, past Commission precedent as well as current policy make clear that the ultimate sanction of removal of all licensee rights is reserved for cases of egregious misconduct evincing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee. While we have not stinted in our description of the actionable conduct in this case, we do not think it approaches the above definition or in any way approximates those cases where non-renewal of all co-owned stations was justified. We also have little doubt that the loss of KQEC-TV will serve to deter any serious future misconduct at KQED-FM and KQED-TV. Accordingly, the licenses for the latter stations will be renewed for the current terms.[21]

MTP -- Financial Availability Issue.

38. An issue to determine whether MTP has "reasonable assurance" of the availability of funds needed to construct and operate the proposed station was specified in this proceeding, because MTP had represented in its application (see FCC Form 340, Exhibit 5) that it was relying upon grants for its proposed station from the National Telecommunications Information Agency (NTIA) and an unspecified state agency, but had failed to show that it had actually filed its grant requests with those two funding agencies. The ALJ found under this issue that: (1) MTP proposed to meet its estimated construction and operating costs[22] from funds supplied by NTIA and the California Department of Education;[23] (2) that it first filed its grant application with NTIA in January 1986 (MTP's construction permit application was filed November 1, 1983); (3) that NTIA responded in February 1986 by sending MTP a deficiency notice requesting additional information; (4) that MTP amended its grant application on February 28, 1986 (albeit putatively not addressing all of NTIA's cited deficiencies); and (5) that MTP requested NTIA on March 17, 1986 to defer its grant application until the next fiscal

year. I.D., paras. 164-166. He concluded that MTP was financially unqualified, opining that its reliance on NTIA funds is "little more than conjectural" (I.D., para. 199) and its assurance "greatly less than 'reasonable.' Id. at para. 203. He added that MTP's grant application with NTIA was "incomplete," that NTIA had not granted MTP any funds, and that MTP had not filed any grant application for the California funds.

39. MTP objects to the ALJ's findings and conclusions, contending that Commission policy merely requires noncommercial applicants relying upon NTIA and state grants to certify that they are relying on such funds. *See Public Notice*, released December 13, 1982, *Application Forms*, 52 RR 2d 1362 (1982). It points out that the *Public Notice* expressly states that "no further action on [the applicant's] part is required" (other than certification) if relying upon NTIA funds; and, if relying upon state funds, applicants are simply to "advise the FCC when the funds are committed or appropriated." 52 RR 2d at 1364. Furthermore, in response to the putative deficiencies cited in the I.D., MTP claims that the state agency only requires an applicant to file a Notice of Intent to file a grant application, which it has done, and the Notice of Intent formally initiates the state grant process. It adds that at the later invitation of the state, the remainder of the grant cycle is completed. MTP also challenges the conclusion that its grant application to NTIA was "incomplete" or that any adverse implication can be derived from the fact that no funds have yet been granted by NTIA. On the former point, it argues that it is inappropriate for the ALJ to substitute his judgment for that of NTIA regarding potential deficiencies, and that in any event, based on the testimony of a former NTIA employee presented by KQED, the deficiencies are curable, citing to Tr. 1979. And, with respect to the finding that NTIA has not yet given it any funds, MTP asserts that it is NTIA policy not to fund a grant application unless and until an applicant receives a construction permit from the Commission. Finally, MTP cites *Arizona Number One Radio, Inc.*, 103 FCC 2d 550, 553-557 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 44 (1987), *aff'd sub nom. Interstate Broadcasting System of Arizona, Inc. v.* FCC, No. 87-1060 (D.C. Cir., filed January 25, 1988), as support to demonstrate that the Commission has previously exhibited flexibility to a sister federal agency where, as here, a regulatory gridlock occurs and each agency's policy is to await action from the other before issuing its final determination.

40. The Mass Media Bureau also objects to the ALJ's resolution of this issue, contending that MTP's inability to make a detailed pre-grant financial showing should not disqualify MTP from this proceeding. It argues that the Commission recognizes that educational applicants frequently depend, "to some extent, on community fund raising drives, subscriptions, federal and state grants or combinations thereof," and that greater leeway is therefore accorded the educational station because of its very nature. (Med. Bur. Br. at 9). The Bureau maintains that MTP has fulfilled all of the requisite requirements. It notes, too, that MTP filed a copy of its NTIA application with the State of California Clearing House and that the state verified that MTP has complied with the state review process. The Bureau asserts that even the worst case scenario – the educational applicant is denied grant funds after the Commission has awarded it a construction permit – outweighs the alternative of precluding many worthwhile educational television endeavors by applying to noncommercial educational applicants the same stringent financial requirements generally applied to commercial applicants. Finally, the *amici* essentially endorse in their brief, *see* note 3, the position taken by the Bureau. They contend out that the principal problem adversely affecting increased minority ownership is access to financing and argue that the Board should not compound this condition by adhering to an "unreasonably" high standard.

41. In the final analysis, we are unable to hold that MTP has not met the Commission's current financial requirements for noncommercial broadcast applicants who signify in advance an intent to rely upon NTIA and state funding for construction and start-up expenses. Although no Commission text expressly differentiates between the ordinary "reasonable assurance" standard applied to commercial broadcasters, *see e.g., New Financial Qualifications Standards for Broadcast Television Applicants*, 72 FCC 2d 784 (1979) (applicants must, *in advance*, demonstrate construction and 90-day revenue cushion without reliance on advertising revenues); *see also In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, FCC 87-97, released March 19, 1987 (Public Notice), and the same "reasonable assurance" standard as applied to those noncommercial applicants indicating a prospective reliance on NTIA and/or state funding, we must infer from the inherent difference in underlying circumstances that an altogether different *practical* standard obtains to applicants in the latter category. That is, absent some collateral condition which raises substantial questions as to whether NTIA (and/or a state funding agency) will act unfavorably on the funding requests of that particular applicant, the Commission appears content to assume for its own licensing purposes a favorable disposition on the noncommercial applicant's federal (and/or state) funding requests. The Board readily concedes that the Commission has nowhere spelled out this unusual assumption. But, at the same time, it has nowhere advised noncommercial broadcast applicants of any requirement to demonstrate *alternative* funding, should the applicant's proposed federal (and/or state) funding fall through, in whole or in significant part. So far as the Board and the Mass Media Bureau are aware, the sole requirement in this vitally important regard is that a noncommercial broadcast applicant indicate at the outset its reliance on NTIA (and/or state) funding; further say not the FCC application form, the detailed instructions thereto, or the various policy statements relating to the general financial qualifications of broadcast applicants.[24] Under these circumstances, we cannot find that MTP has failed to act in accordance with relevant FCC requirements for noncommercial applicants, such as they are. MTP has filed its funding requests, as it indicated it would do when it filed its instant broadcast application with the FCC. And, unless NITA and/or the State of California were to advise that the requested MTP funding will be denied, in whole or in significant part, the matter of MTP's "reasonable assurance" of adequate financing is - at this point - simply beyond a more definitive prognosis. In that respect, the Board is acutely aware that there is no small irony involved in removing the Channel 32 license from the hands of one noncommercial licensee for reasons *directly* traceable to inadequate financial resources, and then placing that same Channel 32 license in the hands of an applicant which may turn out to be even *less* well financially endowed. But, that is a matter apparently beyond the immediate control of the FCC, which must now await future funding action by NTIA and the State of California.

Should MTP fall financially short, we have no doubt whatsoever that the Commission will rise up and take timely and appropriate action. *See , e. g., Metrovision, Inc.*, 2 FCC Rcd 1907 (1987), *recon. denied*, DA 88-126, released February 10, 1988.

Motion to Enlarge Issues

42. By *Memorandum Opinion and Order*, FCC 86M-1384, released April 22, 1986, the presiding ALJ denied a motion filed by KQED[25] seeking issues against MTP to explore a false financial certification and "forged" signature of Bonnie Asano, MTP's Secretary, on MTP's application. The request for the false certification issue was grounded on the allegation that MTP had not filed grant applications with NTIA and the State of California (on which it was relying for construction and start-up funds, *see* paras. 38-41, *supra)* at the time it certified its FCC application as to its financial viability. The ALJ observed that the filing delay did not constitute a misrepresentation because MTP's financial certification was expressly qualified as "contingent upon a grant from NTIA and the state." *Memorandum Opinion and Order, supra*, at para. 10. He added that the applicant had never made a representation "that such applications had been filed or would soon be filed." *Id.* With respect to the "forgery" facet of the motion, the ALJ reproved KQED for its characterization of MTP's behavior, pointing out that forgery is a crime and "crimes *qua* crimes, are not tried in these premises." *Id.*, at para. 11. He found "that little more occurred in affixing the signature of MTP's Secretary than [Asano] was called away on an emergency with instructions to have her signature placed on the application if she did not return." *Id.* The ALJ concluded that the placing of her signature on the application "worked no fraudulent deceit to her or unduly prejudiced anyone, including this agency," and that Asano "appears in every way to have ratified and adopted whatever act has been made in her name." *Id.*

43. KQED contends that the ALJ erred in failing to add the two issues in question. It charges that MTP's financial certification was false in three respects: (1) MTP had not filed its grant applications at the time it filed its FCC application containing the certification; (2) MTP certified in its FCC application that it had reasonable assurance of present commitments from donors, parties furnishing funds, loans by banks or financial institutions, or equipment suppliers; and (3) MTP certified that it had sufficient net liquid assets on hand or available from committed sources to finance its construction and start-up costs. Moreover, KQED claims that MTP did not take any steps to establish the cost of construction until after its certification was filed. With respect to the "forgery" issue, KQED argues that the Board has previously concluded, when confronted with a false signature, that it "follows that the [applicant has] pursued a conscious course of misrepresentation," quoting from *American International Development, Inc.*, 75 FCC 2d 109, 128 (Rev. Bd. 1979), *modified*, 86 FCC 2d 808 (1981). Alternatively, KQED argues that, in any event, MTP's behavior violated Section 73.3513 of the Commission's Rules requiring applications to be signed by a principal of the applicant. Both MTP and the Bureau contend that the ALJ was correct in denying the issues.[26]

44. We agree with the ALJ that there was no adequate basis for a false certification issue in light of the express language in MTP's application that its funding is contingent upon grants from NTIA and the State of California. The other representations highlighted by KQED, *i. e.*, "present commitments" and "assets on hand," must be read in the context of the qualification above. MTP elucidates in its Reply Exceptions that, as of the date of the filing of its application, the Commission had not yet issued a noncommercial application certification form, and thus MTP utilized the boiler plate standard commercial certification language while adding the qualifying language to show specifically that reliance was being placed on state and federal grants. It is clear that the Commission was neither misled by MTP's certification nor understood MTP to have represented that it already had commitments of funding or funds already on hand; that is, the Commission expressly noted in its first *Hearing Designation Order* that MTP was relying on funds from NTIA and a state agency. We further agree with the Bureau and MTP that there is no reason to explore whether MTP failed to prepare cost estimates prior to certification. Both point out that KQED's contention was premised on the deposition testimony of only one MTP principal that she *personally* did not make any inquiry about the cost of equipment until after the certification. In contrast, MTP's Chief Financial Officer averred that the applicant was provided with the necessary cost estimates prior to the filing of the application. (*See* Supplement filed April 24, 1986 to MTP's opposition to motion to enlarge issues.)

45. Furthermore, the ALJ properly refused to add an issue predicated on the "forgery" allegation. As the ALJ observed, no " *malo animo* on anyone's part appears" in affixing Asano's signature to the application. *Memorandum Opinion and Order, supra*, at para. 11. Rather, Asano volunteered in her deposition testimony that the actual signature affixed to the application was not hers. She went on to explain that on the day the application was scheduled to be sent by mail to Washington she was called away from the office by a personal emergency, after reviewing the application which was complete except for the signature (*i. e.*, she wanted MTP's President to review it before she signed it), and she, therefore, authorized her attorney to affix her (Asano's) signature to the application in the event she was unable to return to the office before the application had to be mailed. Like the ALJ and the Bureau, we have no reason to doubt her veracity. Apparently, she freely volunteered the information during deposition prior to any question having been raised regarding this matter; and no questions, except the false certification matter discussed, *supra*, have been raised concerning the accuracy of the information submitted in the application. KQED's reliance on *American International Development, Inc., supra*, is misplaced. In that case, the Board found that the applicant and her husband had testified falsely that the applicant had personally affixed her signature to the application and related exhibits. Here, by way of contrast, the MTP principals never denied that Asano did not personally sign the application and related documents, and, indeed, Asano brought forward the information to the forum in the first instance. In sum, we find that there is not a sufficient predicate for granting the relief requested.

46. Before leaving this matter, however, we note that the affixation of Asano's signature on the application and related documents by an outside party technically violated both the Commission's signature rule, 47 CFR §73.3513, which identifies the individuals who must sign applications, amendments, and related statement of fact, and Section 319(a) of the Communications Act of 1934, as

amended, which prescribes that applications shall be signed by applicants. *See Jane A. Roberts*, 29 FCC 141, 149-150 (1960). In *Roberts*, the Commission held that the affixation of an applicant's signature to an application by her husband, a non-party, pursuant to a mistaken belief that he was empowered to do so, "resulted in a validly pending application although [statutorily] defective insofar as grant was concerned." 29 FCC at 150. Concluding that the statutory defect could be cured by later amendment,[27] the Commission in granting the application simultaneously directed the applicant to file a *nunc pro tunc* amendment conforming its application with the requirements of the Commission's rule. A similar amendment is likewise required here. MTP appears to have been aware earlier that a curative amendment would be required, since it represented in its April 21, 1986 opposition (at p. 11) to KQED's request for this issue, that it would file an appropriate petition for leave to amend. Apparently, however, it never filed such an amendment. MTP, therefore, will be required to do so now[28] as a condition to the grant of its application.

Miscellaneous

47. Although not decisional, two aspects of the ALJ's analysis require a brief comment because of the public interest concern expressed by the Civil Rights Groups in their *amicus* brief, and MTP in its exceptions, that some of the ALJ'S language could discourage minorities from applying for future noncommercial educational broadcast permits. The first matter relates to the ALJ's discussion concerning the "representativeness" of MTP's governing board. He concluded that the "representativeness" of the board left much to be desired, but that this "imperfection" was curable, and he suggested that if MTP's application were granted, the "imperfection" would need prompt attention as a condition of grant. *I. D.*, para. 204. Both the *amicus* and MTP interpret the ALJ's language as a finding that a 100% minority-controlled noncommercial educational applicant is *per se* an "imperfection" and, indeed, may contravene the FCC's licensing standards. We are of the view that both MTP and the *amicus* have read too much into the ALJ's cautionary language. Section II, Question 10, of FCC Form 340 requires nonprofit organizations that are not governmental bodies or educational institutions to show that their officers, directors, and members of the governing board are *broadly representative* of the educational, cultural and civic groups in the community. Because MTP had failed to provide this requisite information in its application, a "representativeness" issue was specified against it. *Memorandum Opinion and Order*, FCC 86M-1048, released March 24, 1986. The issue, however, was not concerned with whether the applicant's governing board was comprised of minorities or not, but rather whether the board was representative of all of the groups above. And, on this narrow inquiry, the ALJ concluded that MTP's showing was marginal, although not disqualifying. *See I. D.*, para. 204. We note in this regard that the *I. D.* repeats MTP's claim that its governing board includes a past or present affiliation in 12 of 15 categories comprising the San Francisco organizations. *See I. D.*, para. 167. We therefore perceive no necessity for placing a "representativeness" condition on MTP's grant, and affirm the ALJ's resolution of the issue in MTP's favor.

48. The second matter centers on language by the ALJ that "a specialized or heavily minority-oriented format is the very antithesis of a *noncommercial educational* aspirant for public franchise." *Id.*, at para. 208. Both the *amicus* and MTP interpret this language to mean that proposals to provide a minority format over a public station are potentially disqualifying and cannot legally serve the public interest. The *amicus* brief urges the Board to reverse the ALJ's negative evaluation of such proposed service and convert it into a substantial credit. KQED agrees in its comments that the ALJ's observation is erroneous, if penalizing minority programming is what the ALJ actually had in mind. We, too, would certainly agree. The Commission has long recognized that "[a]dequate representation of minority-viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1981). KQED argues, however, that the ALJ's observation was actually an articulation of his conclusion that MTP's efforts in determining the community's needs were minimal, resting primarily on *inter se* discussions of its board members. This may be, since the ALJ's language was qualified by the further comment that "[a]ll *significant* audiences whatever their make-up, including minorities, are to be served . . . whatever their disparate needs, tastes, interests, culture and education; and not certainly, *incidentally*, which is the proposal of MTP." *I. D.*, at para. 208. Moreover, the *I. D.* quotes language from MTP's proposed findings that implies that MTP might ignore the needs and interests of the other minority groups in its service area as a matter of policy. Specifically, MTP:

> proposes 'to broadcast a specialized format of programming *by and about Black Americans* that is not currently available' in its proposed service area. . . . this is programming *conceived by Blacks* which may be *produced and/or written and edited by Blacks pertaining to topics of interest to Black communities* and also designated as potentially informative to non-Black audiences as well. [MTP Proposed Findings at 34-35.]

I. D., at para. 207. At the first oral argument on July 10, 1987, the Board asked counsel for MTP whether MTP's proposed findings were to be taken literally, and only blacks employed by the station, or whether (for example) Hispanics or Asians would be precluded from getting a job in management, writing, or editing at the proposed station. Tr. 2252-2253. MTP's counsel explained that in terms of staffing and other considerations, it would not exclude others and that it was proposing a substantially minority format in terms of programming. Tr. 2255. The Board responded (Tr. 2256):

> You say 'substantially' and I think what obviously prompted my question is that the language as written sounds exclusionary and not inclusionary. In other words, had you said 'substantially' in that language, I don't think anybody would have raised the question and I certainly would not have.

In sum, although we could not have granted the *amicus* prayer that MTP be awarded a comparative preference for its minority format, had the case turned on the applicants' respective comparative showings (*i. e.*, MTP did not seek such credit), MTP, likewise could not have been penalized for proposing such a format.

49. ACCORDINGLY, IT IS ORDERED, That the request for leave to tender amicus comments, filed February 12, 1987, and the request for leave to participate as amici curiae or in the alternative to be granted leave to intervene, filed March 26, 1987, by the National Black Media Coalition, National Association for the Advancement of Colored People, and National Association of Black Owned Broadcasters, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects; and

50. IT IS FURTHER ORDERED, That the motion to accept late-filed pleadings, filed May 1, 1987 by Minority Television Project, Inc. IS GRANTED; that the petition for leave to amend, filed June 5 and supplemented June 8, 1987, by Minority Television Project, Inc. IS GRANTED, and the amendment IS ACCEPTED; that the contingent petition for leave to amend filed June 8, 1987, by Minority Television Project, Inc. IS GRANTED, and the amendment IS ACCEPTED; and that the petition for leave to amend, filed November 30, 1987, by Minority Television Project, Inc., IS GRANTED, and the amendment IS ACCEPTED; and

51. IT IS FURTHER ORDERED, That the applications of KQED, Inc. for renewal of license of noncommercial educational stations KQED-FM (File Nos. BRED-237, BRED-800801ZS and BRED-830801WD) and KQED-TV (File Nos. BRET-25, BRET-800801LQ, and BRET-803801LK) ARE GRANTED, and the application of KQED, Inc. for renewal of license of noncommercial educational station KQEC-TV (File Nos. BRET-203, BRET-800801LV, and BRET-830801LJ) IS DENIED; and

52. IT IS FURTHER ORDERED, That the application of Minority Television Project, Inc. (File No. BPET-831101KI) for a construction permit to establish a new noncommercial educational television Station on Channel 32, San Francisco, California IS GRANTED, subject to condition that Minority Television Project, Inc. file an amendment, *nunc pro tunc*, to its application to conform that application with the requirements noted in paragraph 46 of this Decision.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Further detail on the history of this proceeding appears in *KQED, Inc.*, FCC 85R-34, released April 26, 1985 (reinstatement of dismissed MTP application).

[2] The reasons for partial rehearing of oral argument are set out in *KQED, Inc.*, 2 FCC Rcd 7408 (Rev. Bd. 1987).

[3] On March 26, 1987, the National Black Media Coalition, the National Association for the Advancement of Colored People, and the National Association of Black Owned Broadcasters requested leave to participate as *amici curiae* or in the alternative, to intervene, and jointly filed a brief addressing issues they believe are raised by the *I. D.* in connection with MTP's application pertaining to minority ownership, minority programming, and financial qualifications of minority applicants. While these petitioners have not satisfied the standards of 47 CFR 1.223 governing party intervention, nevertheless, in accordance with past Commission practice, we will accept their *amicus* brief and consider the comments therein. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018-1019 (1981); *aff' d sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (1982); *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262 n.3 (1982).

[4] The station was donated to KQED by Metromedia in 1970 and began operations in June 1971. (*I. D.*, para. 21).

[5] The Commission stated that while it "is not unsympathetic concerning the financial difficulties encountered by KQED, to allow the channel to lie fallow any longer would be an egregious disservice to the public." 57 FCC 2d at 269. It deferred KQEC-TV's renewal and stated: "The licensee is warned that failure to resume broadcasting could result in dismissal of KQEC-TV's renewal application, cancellation of authorization, deletion of call letters or other appropriate sanction." 57 FCC 2d at 270 n. 8.

[6] Tiano conceded that the December 27 letter was also inaccurate insofar as it represented that KQEC-TV had been continuously off the air and for technical reasons could not return, since in fact the station had returned to the air from December 8 to December 31, and was broadcasting on the very date of the letter. (Tr. 836-837).

[7] Interestingly, on April 18, only four days earlier, KQEC publicly announced that it had filed an application for STV authority for Channel 32 with the Commission, which confirms the low priority status assigned that station.

[8] At page 8, n.1 of its 35-page opening brief, KQEC states: "For a review of the facts of the darkening of KQEC and the correspondence with the Commission see the Factual Addendum to this document." The referenced chronology is itself eleven pages long. This Addendum does not comport with Commission pleading practice which requires the filing of issue-oriented consolidated exceptions and brief. *See Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 875 (1976) and 47 CFR 1.276(a)(2). Therefore, it will not be separately addressed. We note, in any event, that much of the chronology is contained in the *I. D.* 's findings, upon which we rely, and that KQEC's two key objections to the ALJ's findings are treated in the text heareafter at paras. 20-21.

[9] "Now, I don't know what this means" (Tr. 2477). "[A]nd believe me, I haven't got any explanation for this . . . " (Tr. 2478).

[10] In addition to the overall deception, KQEC's letters contained other specific falsehoods. For example, although its November 2 letter stated that "The licensee cannot maintain a separate schedule for KQEC (TV) during this installation . . . ", in fact its chief engineer, its manager of engineering facilities, and Tiano all testified that the station could have been kept on the air by purchasing or renting a simple and inexpensive switcher. Likewise its December 27 letter falsely represented that the station was still off the air due to equipment delays when in fact Channel 32 had returned to the air in December and remained on until the end of the month.

[11] Despite his language at *I. D.* para. 214, the ALJ was able to conclude that KQEC's lack of forthrightness and failure to observe high standards of punctilio warranted a sanction of a short-term renewal. (*I. D.* paras. 215-216, 220). These terms, however, are traditionally associated with the concept of lack of candor. *See Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136-1137 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127 (1983). Nevertheless, KQED contends that the ALJ erred in imposing an even higher standard on it because of its status as a noncommercial licensee. (Br. at 17-21). There is language in *I. D.*, para. 216, suggesting that the high standards of punctilio expected of all licensees "would seem more so" where a noncommercial franchise is involved. Insofar as the ALJ's decision rests solely on this basis, we agree with KQEC

that no Commission authority has been cited to support holding these particular licensees to higher character standards. Nevertheless, because we conclude that the record below fully establishes misconduct under the designated issue, the ALJ's overstated dictum in this regard is harmless.

[12] *California Public Broadcasting Forum v. FCC, supra* at 679-680; *see also Memorandum Opinion and Order*, FCC 85-663, released January 3, 1986, at para. 8.

[13] Mimeo No. 4615, released June 8, 1984.

[14] Forum Comments, filed June 14, 1985, at 2.

[15] KQED Comments, filed June 14, 1985, at 2.

[16] *Memorandum Opinion and Order*, FCC 85-663, released January 3, 1986, at para. 9.

[17] Because we consider the issue as designated broad enough to encompass the misconduct demonstrated on this record, we need not address exceptors' contentions that any misrepresentation issue automatically subsumes lack of candor and that candor is always in issue. In this regard, *compare West Coast Media, Inc. v. FCC*, 695 F.2d 617, 620 (D.C. Cir. 1982) (intent to deceive "should not be discussed by the Commission in the absence of a designated misrepresentation issue") *with William M. Rogers*, 92 FCC 2d 187, 199-201 (1982) (an applicant's "candor" is always in issue).

[18] Forum also excepts to the ALJ's failure to find misrepresentations in KQED's June 25, 1980 pleading in opposition to Forum's petition for reconsideration of the Commission's decision in *KQED, Inc.*, 77 FCC 2d 973 (1980) denying Forum's 1977 petition to deny. (Br. at 9-16). These arguments are largely cumulative and not decisionally significant in that they would not result in modification of the misrepresentation finding already made herein.

[19] *See RKO General, Inc.*, 82 FCC 2d 291, 318 (1980).

[20] Also, at the time the Commission acted, RKO's television applications had been denied not only for lack of candor but on other grounds including unlawful reciprocal trade practices, an issue on which presumably there would be no objection to allowing mitigating evidence of good programming.

[21] This result moots the comparative issue pertaining to Channel 32. See, however, paras. 47-48, *infra*. That issue, involving as it does the apparently novel question of how to weight a renewal expectancy in a noncommercial educational context, is itself troubling and could benefit from further Commission guidance. *See Black Television Workshop of Santa Rosa, Inc.*, FCC 84R-81, released November 15, 1984.

[22] Construction and operating costs were estimated to be $467,665 and $158,639, respectively. I.D., para. 164.

[23] NTIA is asked for $350,749 and the California Department of Education is asked for $275,555. I.D., para. 164.

[24] The *amicus* and MTP respectively suggest that the Board modify the Commission's financial qualifications standard to allow an applicant to include as available funds, estimates it expects from fund drives and, in comparative renewal cases, revenues of the operating public station. We must decline these invitations since the Board lacks such authority. *See, e.g., Horne Industries, Inc.*, 91 FCC 2d 1193, 1196 (Rev. Bd. 1982), *clarified*, 53 RR 2d 1647 (1983).

[25] Second Motion to Enlarge Issues Against MTP, filed March 28, 1986.

[26] Although the Bureau initially supported the addition of the "forgery" issue in its comments filed April 15, 1986, on subsequently reviewing MTP's opposition, which was filed on the same date as the comments, the Bureau agreed that the facts did not warrant the specification of an issue. *See* Bureau's Reply Exceptions, at n.2.

[27] In reaching this result, the Commission relied on *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949), where the Court had held that the Commission could not grant an unverified application where verification was required by statute, but that such statutory defect could be cured by later amendment. The Commission concluded that the absence of signature and verification should be treated equally since both requirements appeared together in the same section of the Communications Act.

[28] Although we do not condone MTP's apparent delay in filing a curative amendment, it is our view that, on balance, the equities justify acceptance of an amendment at this stage of the proceeding. This has been a protracted proceeding and further delay in providing service to the San Francisco area, occasioned by disqualification of MTP on a defect effectively technical in nature at this point, would not serve the public interest.

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

I concur in the Board's Decision denying KQEC's license renewal, which is supported by the clear and convincing documentary and testimonial evidence set forth in paragraphs 4-17. See Catoctin Broadcasting Corp., 2 FCC Rcd 2126, 2139-2140 (Rev. Bd. 1987) and Mid-Ohio Communications, Inc., 104 FCC 2d 572, 600-601 n.21 (Rev. Bd. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v.

ANCHORAGE TELEPHONE UTILITY,	File No. E-88-1
CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-88-2
CONTINENTAL TELEPHONE COMPANY OF KANSAS,	File No. E-88-6
CONTEL OF TEXAS, INC.,	File No. E-88-9
CONTINENTAL TELEPHONE COMPANY OF VIRGINIA,	File No. E-88-10
DIAMOND STATE TELEPHONE COMPANY,	File No. E-88-11
EXCHANGE CARRIERS ASSOCIATION, *et al.*,	File No. E-88-12
GENERAL TELEPHONE COMPANY OF CALIFORNIA,	File No. E-88-13
GENERAL TELEPHONE COMPANY OF THE SOUTH, *et al.*,	File No. E-88-15
GTE MTO, INC., *et al.*,	File No. E-88-16
INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-88-17
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-88-18
MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.,	File No. E-88-19
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-88-20
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-88-23
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-88-24
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-88-25
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	File No. E-88-26
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-88-27
THE OHIO BELL TELEPHONE COMPANY, and	File No. E-88-28
ILLINOIS CONSOLIDATED TELEPHONE COMPANY,	File No. E-88-31

Defendants.

ORDER

Adopted: May 10, 1988; Released: May 18, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 30 and October 20, 1987, AT&T Communications (AT&T) filed the above-captioned formal complaints, alleging that the defendants' earnings for interstate access services for the period October 1, 1985 through December 31, 1986 exceeded the authorized rate of return established by the Commission in *Authorized Rates of Return for Interstate Services for AT & T and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-257 (released September 30, 1985) (*Phase I Order), modified on* recon., FCC 86-114 (released March 24, 1986), further recon., FCC 86-544 (released Jan. 14, 1987). At the request of AT&T, service of the complaints was deferred pending resolution of an appeal to the United States Court of Appeals for the District of Columbia Circuit of the automatic refund enforcement rule adopted in the Phase I Order. On January 22, 1988, the Court remanded the case to the Commission for further consideration. American Telephone and Telegraph Co. v. FCC, No. 85-1178, slip op. (D.C. Cir. January 22, 1988). Subsequently, on April 22, 1988, AT&T submitted a letter to the Commission requesting permission to withdraw the complaints without prejudice in view of the Court's decision.

2. We have carefully reviewed this matter and, in accordance with Section 1.713 of the Commission's rules, 47 C.F.R. § 1.713, we find that granting AT&T's request would be consistent with the public interest.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaints ARE DISMISSED without prejudice and these proceedings ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-568

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 1145

Revisions to Tariff F.C.C. No. 12

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1988; Released: April 28, 1988

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On February 29, 1988, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1145 to introduce Option II of the Virtual Telecommunications Network Service (VTNS). Although VTNS Option II (VTNS II) is described as a "generally available interstate service,"[1] VTNS II is an integrated voice and data network designed specifically for the use of Ford Motor Company (Ford). AT&T D&J at 5. In its filing, AT&T has also proposed general regulations applicable to VTNS options, replacing much of the cross-referencing currently contained in Tariff No. 12.[2] This is the third in a series of non-governmental customer individualized offerings by AT&T which consist of a customized bundled service priced at a fixed rate over a specified time period. [3] Transmittal No. 1145 is scheduled to become effective April 29, 1988.

2. On March 15, 1988, US Sprint Communications Company (US Sprint) filed a petition for rejection or in the alternative suspension and investigation and MCI Communications Corporation (MCI) filed a petition to investigate the filing. The Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition to suspend and investigate on March 16, 1988.[4] AT&T filed its reply on March 28, 1988.

II. SERVICE DESCRIPTION

3. AT&T states that this offering, specifically designed for Ford, is the result of an offer "using the VTNS concept" in response to a Request for Quotation by Ford. AT&T D&J at 2. AT&T asserts that the specificity of the offering is reasonable because of the customer's location. *Id.* at 1.

4. VTNS II consists of two features not found in previous custom-designed offerings -- Authorization Codes, to which any particular call may be billed from any phone, and Port Access Telephone Numbers, a feature which assigns numbers to specific ports, thereby allowing calls from any location inside or outside the system to be billed to that specific port. *Id.* at 5-6. The rates for VTNS II include a basic charge for the network, usage charges, and a minimum annual charge. *Id.* at 7. VTNS II also provides for a system of incentive payments and penalties for the early completion or delay, respectively, in the provision of services.

5. AT&T provides demand and revenue information regarding the impact of VTNS II on the other services of AT&T, and supporting financial data indicating that VTNS II recovers its costs on both a fully distributed basis and a net revenue basis. *Id.* at 22-28. Prospective cost studies assert that VTNS II is estimated to have a positive impact on net earnings in 1990 in both the private line and switched services categories, and on total interstate earnings. *Id.* at 25. AT&T also provides a comparison of the rates for VTNS II to the rates for other offerings of AT&T. *Id.* at 30.

III. OBJECTIONS TO TARIFF PROPOSAL

6. US Sprint objects that although the service is designated a "generally available interstate service" offering, it has been "custom designed" so that it can be used only by the one customer,[5] and that the rates charged under the tariff are based upon AT&T's specific costs of serving that customer. MCI and IDCMA object to the specific nature of this contract, and to the anti-competitive effects of integrated or "opaque" offerings. MCI Petition at 6-7; IDCMA Petition at 3-4. MCI further contends that this service could be made on a generalized basis, and that generalized demand exists for the offering. MCI Petition at 4-5.

7. US Sprint asserts, as it has in previous Tariff 12 filings, that a customer-specific filing of this type is inconsistent with a system of tariff regulation, and is patently unlawful. US Sprint Petition at 3. MCI reminds the Commission that VTNS Option I is currently being investigated, *inter alia*, to determine whether it is discriminatory in violation of Section 202(a) of the Communications Act, and that VTNS II raises the same issues. MCI Petition at 8-9. MCI maintains that Option II raises issues of undue preferential advantage, and may constitute a license for AT&T to discriminate among its customers for its own competitive purposes. *Id.* at 9-12. US Sprint and MCI contend that this filing violates both the *Private Line Guidelines* and the policies of the Commission regarding resale. US Sprint Petition at 3; MCI Petition at 15-18.

8. According to US Sprint, rejection is also warranted because AT&T's cost justification is deficient. US Sprint Petition at 3-4. US Sprint and IDCMA challenge the accuracy and completeness of the data filed by AT&T, and question the underlying assumptions. *Id.* at 4-6; IDCMA Petition at 5-11. US Sprint notes that the comparison of AT&T's rates for VTNS II and other AT&T offerings shows that the voice rates for VTNS II are among the lowest for all service offerings. US Sprint Petition at 5. In addition, the assignment of billing and collection and other expenses, including marketing, sales, and engineering expenses, is challenged by the petitioners as being too low, especially in light of the special system that will have to be developed to handle the special billing functions, and the time and expense associated with marketing and negotiating this kind of arrangement. *Id.* at 5-6; MCI Petition at 14-15; IDCMA Petition at 5 n.5. Both MCI and IDCMA express concerns that VTNS may be cross-subsidized by other AT&T customers. MCI Petition at 13-14; IDCMA

Petition at 8-9. IDCMA urges the Commission to combine this investigation with the ongoing investigation of custom-designed services offered by AT&T. IDCMA Petition at 14.

9. In defense of its proposal, AT&T asserts that the attacks of the petitioners based upon the cost and other financial information provided misinterpret the materials provided by AT&T, are restatements of challenges lost before, and should therefore bear no weight. AT&T Reply at i-ii, 9-13. AT&T states that the same network design and costing methodologies used in its Option I filing were used in VTNS II and asserts that it has "demonstrated profitability" with a net revenue analysis. AT&T Reply at 2. AT&T avers that the cost savings for the VTNS II customer are partially a result of AT&T's efficient use of facilities through the use of customized bundled offerings. AT&T Reply at 6. AT&T further asserts that the VTNS II tariff contains no explicit or implicit restrictions on resale. *Id.*

III. DISCUSSION

10. The Common Carrier Bureau has reviewed Transmittal No. 1145 and the pleadings filed by petitioners and by AT&T. We conclude that no compelling arguments have been presented that the tariff proposal is so patently unlawful as to warrant rejection.

11. We also conclude, however, that certain issues warrant further investigation. Inasmuch as we have already initiated an investigation to examine DTSN and VTNS I,[6] which present similiar concerns, we will include this transmittal in the ongoing investigations of AT&T's Transmittal Nos. 895, 961, 1018, and 1102. In an Order to be released shortly, we will designate the issues to be investigated and establish a pleading cycle at that time. We have also concluded that the VTNS II offering should be subject to accounting safeguards to prevent subsidization of VTNS II service with revenues from other services. This approach balances the interests of prospective VTNS II customers, competing vendors, AT&T, and AT&T's ratepayers. We adopted similiar mechanisms in our DTSN Order and VTNS II Order, and found that such action provided a reliable safeguard against cross-subsidization.

IV. ORDERING CLAUSES

12. Accordingly, we direct AT&T to offer the Virtual Telecommunications Network Service, Option II, on a separate accounting basis, *i. e.*, revenue, cost, and investment amounts relating to the Virtual Telecommunications Network Service, Option II, will be excluded from the Interim Cost Allocation Manual private line category for purposes of applying the equalization requirement[7] and measuring compliance with applicable provisions of Part 65 of the Commission's Rules. This will ensure that rates for other AT&T Communications private line services are not increased to compensate for any earnings shortfall that may be produced by Virtual Telecommunications Network Service, Option II. We waive the Interim Cost Allocation Manual and Part 65 requirements through December 31, 1988, to the extent necessary to exclude the Virtual Telecommunications Network Service, Option II.

13. IT IS FURTHER ORDERED pursuant to Sections 218 and 220(a) of the Communications Act, 47 U.S.C. §§ 218 and 220(a), and the authority delegated under Sections 0.91(g) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that AT&T shall separately account for revenues, costs, investment, and net earnings associated with Virtual Network Communications Service in accordance with para. 12, *supra*, until further notice.

14. IT IS FURTHER ORDERED that Part 65 of the Commission's Rules, 47 C.F.R. Part 65, IS WAIVED to the extent indicated in para. 12, *supra*.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a) and 205, that an INVESTIGATION IS INSTITUTED into the lawfulness of the above-captioned tariff revisions and IS INCORPORATED into the Commission's ongoing investigation in CC Docket No. 87-568.

16. IT IS FURTHER ORDERED that American Telephone and Telegraph Company shall be a party to this proceeding.

17. IT IS FURTHER ORDERED that the comments filed by the Ford Motor Company and the Ad Hoc Telecommunications Users Committee, described in note 4, *supra*, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Description and Justification (AT&T D&J) at 1.

[2] AT&T has received a limited waiver for any remaining cross-referenced sections under Special Permission No. 88-87, Feb. 22, 1988. *Id.* at 3.

[3] The first two such offerings for non-governmental customers were Digital Tandem Switched Network (DTSN) Service, created for the General Electric Company in Transmittal Nos. 895 and 961, and VTNS Option I, designed for DuPont in Transmittal Nos. 1018 and 1102. Both of these offerings are currently in effect but under investigation.

[4] On March 28, 1988, Ford Motor Company (Ford) and the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed comments in response to the pleadings filed. The Ford filing is primarily limited to outlining the events leading to the selection of AT&T pursuant to its RFQ, and discussing its needs in the field of telecommunications services. Ford Comments at 2-6. Ad Hoc avers that the provision of turn-key telecommunications is a market segment that is discrete from the assemblage of various tariffed services. Ad Hoc Comments at 2. It also comments that in its opinion this service is not discriminatory because it is a new service offering for which anyone could apply (*id.* at 3), and that it does not preclude resale. *Id.* at 4. The pleadings filed by Ford and Ad Hoc in this proceeding, which are not authorized by the Commission's Rules, are dismissed.

[5] US Sprint Petition at 1 (quoting AT&T D&J at 1).

[6] *See* DTSN Memorandum Opinion and Order, 2 FCC Rcd 5493 (1987), and Order Designating Issues for Investigation, CC Docket 86-568, 2 FCC Rcd 7389 (1987); *see also* VTNS I Memorandum Opinion and Order, 3 FCC Rcd 995 (1988).

[7] The equalization requirement refers to the process by which private line tariffs are retargeted so that the earnings of AT&T Communication's various private line services, as a whole, are not

at variance with the prescribed rate of return. *See* AT&T Communications, Transmittal No. 581, Mimeo No. 4620, released May 20, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 379
New York Telephone Company Revisions to Tariff F.C.C. No. 41	Transmittal Nos. 894 and 895
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal No. 1636
Ameritech Services Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 171, 172, 173, and 174
Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 236 and 237
New England Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 40	Transmittal No. 914
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1340

ORDER

Adopted: April 29, 1988; Released: April 29, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from May 2, 1988, to May 26, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] We allowed the LECs' transmittals to become effective subject to the outcome of our investigation and granted the LECs special permission to advance the effective dates of their transmittals.

3. Since the above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*, we hereby allow the instant transmittals to become effective subject to the outcome of our investigation. We also grant the LECs listed above special permission to advance the effective dates of their transmittals.

4. Accordingly, IT IS ORDERED that GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 379, New York Telephone Company Tariff F.C.C. No. 41, Transmittals No. 894 and 895, Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1636, Ameritech Services Tariff F.C.C. No. 2, Transmittal Nos. 171, 172, 173, and 174, Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal Nos. 236 and 237, New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 914, and Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1340, are subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 4, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, and assign Special Permission No. 88-211.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also proposed ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, DA 88-424, released Mar. 28, 1988 (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 1624

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: May 5, 1988; Released: May 6, 1988

By the Chief, Common Carrier Bureau:

1. On February 17, 1988, Southwestern Bell Telephone Company (SWB) filed the above-captioned transmittal, proposing, among other things, to (1) extend to interexchange access customers in Arkansas and Missouri the right to receive interest credits on overcharges under certain circumstances; and (2) amend the circumstances under which interexchange access customers in Texas may receive interest credits on overcharges. On April 1, 1988, SWB filed further proposed revisions (the April revisions) to make provisions relating to interest credits in Texas similar to those proposed for Arkansas and Missouri. Transmittal 1624 is scheduled to become effective on May 7, 1988.

2. On March 3, 1988, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate specified sections of the transmittal, and ALC Communications Corporation (ALC) filed a petition to reject certain of the proposed tariff revisions. On the same day, American Telephone and Telegraph Company (AT&T) filed a letter requesting neither suspension nor rejection of Transmittal 1624, but urging that the Bureau "retain the Southwestern access tariffs, as revised," in our ongoing inquiry in connection with AT&T's petition for rectification.[1] AT&T Letter at 1. SWB filed a reply to the submissions of MCI, ALC, and AT&T on March 11, 1988.

3. Transmittal 1624 provides that, in order to recover interest credits in Arkansas and Missouri (1) the customer must pay the total amount billed on or before the payment date; (2) the customer must notify SWB of the dispute within 130 calendar days from the bill date; (3) within 10 working days after notifying SWB of the dispute, the customer must provide SWB with documentation that includes a "clear and full explanation" of the basis for the dispute, the account number of the disputed bill, the bill date, and "details sufficient to identify the specific amounts and items in dispute"; and (4) the dispute must be resolved in favor of the customer.[2]

4. These proposed tariff revisions provide further that in the event the customer is entitled to recover an interest credit, the period covered by the credit "shall begin on the date the disputed amount was actually paid to the Telephone Company in immediately available funds and shall end on the date that the Telephone Company actually resolves the dispute." *Id.* The applicable interest rate is the same as that charged against the customer in the case of late payments. *Id.*

5. MCI and ALC object to the proposed language stating that interest credits for customers in Arkansas and Missouri will be measured from the date the disputed funds are paid to SWB until the date the dispute is "resolved." They claim that this provision is ambiguous and appears to allow SWB to hold money for some time after resolution of the dispute. MCI Petition at 6; ALC Petition at 2. ALC also complains that the Texas revisions lower the interest rate payable to customers on overcharges, while maintaining a higher rate chargeable to customers in connection with late payments. ALC Petition at 4. [3]

6. SWB replies, generally, that its proposed revisions follow its intrastate tariffs and should be accepted to avoid customer confusion and administrative difficulty. SWB Reply at 2-3, 7. SWB says that ALC is simply wrong in asserting that the proposed tariff revisions would haveId. at 3-4. Finally, SWB responds to allegations that the tariff is ambiguous by stating that its practice is to calculate interest until the credit is posted to the appropriate account on its Carrier Access Billing System, which usually occurs a day or two following resolution of the dispute. *Id.* at 5-6. In any event, SWB asserts, this issue is an "administrative" matter that is inappropriate for specification in a tariff. *Id.* at 5.

7. The Common Carrier Bureau has reviewed the tariff transmittal, SWB's April revisions, and the associated pleadings. We conclude that no compelling arguments have been presented that these proposed tariff provisions are so patently unlawful as to warrant rejection, and that no question has been presented that warrants investigation at this time.[4]

8. IT IS THEREFORE ORDERED that the above-referenced petitions of MCI Telecommunications Corporation and ALC Communications Corporation against Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1624, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1985 Access Charge Tariff Filings, Phase II, AT&T Petition To Rectify Terms and Conditions of Access Tariffs, filed Aug. 22, 1985.

[2] SWB Tariff F.C.C. No. 68, Transmittal No. 1624, Section 2.4.1(D)(2).

[3] MCI and ALC also object to proposed revisions for interexchange access customers in Texas that would change documentation requirements. The April revisions replace those documentation requirements.

[4] We are already examining interest credit provisions generally in the ongoing proceeding on AT&T's petition for rectification. A separate investigation of SWB's particular provisions would be duplicative.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Kansas City Southern
Industries, Inc.

For Authority to Construct and
Operate Multichannel Multipoint
Distribution Service stations at File Nos.

Benton Harbor, Michigan	File No. 6394-CM-P-83
Dubuque, Iowa	6430-CM-P-83
Fayetteville, Arkansas	6435-CM-P-83
Fayetteville, North Carolina	6436-CM-P-83
Florence, Alabama	6438-CM-P-83
Jefferson City, Missouri	6457-CM-P-83
San Francisco, California	6506-CM-P-83
Tuscaloosa, Alabama	6521-CM-P-83
West Palm Beach, Florida	6524-CM-P-83
Jackson, Michigan	16519-CM-P-83
Waco, Texas	16547-CM-P-83

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1988; Released: May 11, 1988

INTRODUCTION

1. This proceeding addresses pleadings relating to a proposed transfer of control of Multichannel Multipoint Distribution Service (MMDS) applications from Kansas City Southern Industries, Inc. (hereinafter referred to as KCSI) to Jones Lightwave, Ltd. (hereinafter referred to as Jones). On December 11, 1987, KCSI submitted amendments for the first ten above-referenced pending MMDS applications which previously had been selected for qualification review by lottery. On January 15, 1988, additional amendments were filed. On January 28, 1988, supplemental amendments were filed. On April 12, 1988, an amendment was filed for KCSI's Jackson, Michigan application which had been selected for qualification review pursuant to a lottery held on March 25, 1988. This amendment incorporated by referenced KCSI's ownership change amendments for the first ten above-referenced applications and requested similar treatment for its Jackson application.[1] On April 29, 1988 supplemental amendments were filed. On May 2, 1988, supplements to the supplemental amendments were filed. No opposition pleadings have been received.

BACKGROUND

2. On November 27, 1987, KCSI entered into an agreement with its wholly-owned subsidiary, Kansas City Microwave Communications, Inc. (herein- after referred to as KCMC), and Jones for a change of ownership from KCSI to Jones of all of its interests in MMDS applications and authorizations. KCSI proposes a two-step process: first, an assignment of its applications to KCMC, and then a transfer of control from KCMC to Jones.[2] KCSI states that this second step, the transfer of control to Jones, constitutes a substantial change in beneficial ownership or control of its MMDS applications.

DISCUSSION

3. *Rule on Application Ownership Changes*. Pursuant to Section 21.29 of the Commission's Rules, 47 C.F.R. § 21.29,[3] the Commission was provided written notification of the existence of the ownership change agreement;[4] a copy of the agreement between KCSI, KCMC, and Jones; and also an itemized accounting which demonstrates that the consideration is limited to "those legitimate and prudents costs directly assignable to the engineering, preparation, filing and advocacy" incurred by KCSI for its MMDS applications.

4. We find that the itemized accounting demonstrates that the consideration is reasonable and does not appear to have provided a financial incentive to delay grant of the requested MMDS authorizations or to unreasonably profit from our application processing procedures.[5]

5. In addition, on the basis of the information before us, we find pursuant to Section 21.29(e) that the ownership change agreement is consistent with the public interest.

6. *Rule on Application Amendments*. Section 21.23 of the Commission's Rules, 47 C.F.R. § 21.23, applies to these proposed amendments. Because each of the first ten above-referenced MMDS applications was tentatively selected by the random selection process,[6] a demonstration of good cause is required by Section 21.23(b) prior to our approval of amendment of the applications.[7] The accompanying good cause showing, which included a description of KCSI's decision to quit the business of communications services and to concentrate upon its transportation business, was sufficient to support acceptance of the amendments at this time. *See Mobilfone, Inc.*, 75 FCC 2d 269 (Rev.Bd. 1979); *R. L. Mohr*, 13 FCC 2d 61 (Rev.Bd. 1968); *Empire Communications Co.*, 39 FCC 2d 143 (Rev.Bd. 1973); *Broadcast Data Corp.*, 97 FCC 2d 650 (Rev.Bd. 1984).

7. Pursuant to Section 21.23(c), this substantial change in ownership is a major amendment and subject to the "cut-off" procedures of Section 21.31, 47 C.F.R. § 21.31, unless it is demonstrated that the ownership change "is for legitimate business purposes other than the acquisition of applications" pursuant to Section 21.23(c)(6). We find that KCSI has adequately demonstrated that this substantial change in beneficial ownership is for legitimate business purposes other than acquisition of applications, reflecting changing service demands and economic conditions. *1976 Part 21 Rule Making Order*, 38 Rad.Reg. 2d at 373. Therefore, these application amendments are not considered to be major amendments, and thus, are not subject to the "cut-off" provisions of Section 21.31. *Id.* ; *see Airsignal International, Inc.*, 81 FCC 2d 472 (1981).

8. KCSI requested waiver of the service requirements of Sections 21.23(b) and 21.23(e). One of the primary underlying purposes of this service requirement is to provide actual notice to any potential interested parties of the substitution of one applicant for another applicant in order to provide the public with an opportunity to comment on the potential public benefits or detriments of the proposed ownership change and the qualifications of the pro-

spective applicant. *See 1976 Part 21 Rule Making Order*, 38 Rad. Reg. at 363-374.[8] Public notices appeared on December 23, 1987 and January 20, 1988. *See* Public Notice, Report No. D-413 (Dec. 23, 1987); Public Notice, Report No. D-419 (Jan. 20, 1988).[9] In these circumstances,[10] the underlying purpose of the service requirement would not be frustrated by grant of the requested waiver as it concerns the amendments for the change in ownership from KCSI to Jones. *See* Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19.

CONCLUSION AND ORDERING CLAUSES

9. With regard to the above-referenced applications, KCSI adequately demonstrated compliance with the requirements of Section 21.23(b) as to a good cause showing and with the requirements of Section 21.23(c)(6) as to classification of the amendments as minor. KCSI was granted a waiver of the service requirements of Section 21.23. KCSI also demonstrated basic compliance with Section 21.29.

10. Accordingly, IT IS ORDERED that the request for leave to amend the eleven above-referenced MMDS applications IS GRANTED and the ownership change amendments ARE ACCEPTED.

11. This order is issued pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b) of the Commission's Rules, 47 C.F.R. § 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a), provides *interalia* : "An MMDS application tentatively selected by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate." KCSI's application amendment of April 12, 1988 was filed within 14 days after the date of the public notice announcing its selection for qualification review.

[2] On November 30, 1987, an Application for Consent to Assignment, FCC Form 702, File No. 50030-CM-AP-88, from KCSI to KCMC and an Application for Consent to Transfer of Control, FCC Form 704, File No. 50029-CM-AP-88, from KCMC to Jones were filed for six of KCSI's MMDS authorizations. On December 3, 1987, the *pro forma* assignment of the six authorizations was approved. On February 22, 1988, transfer of control of the six authorizations was approved. On May 9, 1988, the Commission staff extended the deadline for consummation of this transfer of control until June 24, 1988.

[3] Section 21.29(a) of the Commission's Rules, 47 C.F.R. § 21.29(a), provides *inter alia* :

> Except as provided in paragraph (b) of this section, applicants or any other parties in interest to pending applications shall comply with the provisions of this section whenever: (1) They participate in any agreement (or understanding) which involves any consideration promised or received, directly or indirectly, including any agreement (or understanding) for merger of interests or the reciprocal withdrawal of applications; and (2) The agreement (or understanding) may result in either: (i) A proposed substantial change in beneficial ownership or control (*de jure* or *de facto)* of an applicant such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under Section 310(d) of the Communications Act of 1934 [47 U.S.C. 310(d)] . . .

[4] The Application for Consent to Assignment, FCC Form 702, and the Application for Consent to Transfer of Control, FCC Form 704, filed on November 30, 1987 disclosed the existence of the agreement executed on November 27, 1987, together with the names of the participants and the agreement's subject matter.

[5] As the Commission stated when it adopted Section 21.29, "[O]ur policy should be clearly understood as a general procedural rule to focus upon the reasonableness of any consideration promised or received since this would concern the common financial incentives to delay grants or to unreasonably profit from our adminstrative process." Amendment of Parts 1 and 21 of the Commission's Rules and Regulations applicable to the Domestic Public Radio Services (other than Maritime Mobile), 38 Rad. Reg. 2d 363, 372 (1976) (hereinafter cited as 1976 Part 21 Rule Making Order).

[6] Section 21.23(b) does not apply to KCSI's application for Jackson, Michigan.

[7] The ownership change amendments were filed after the permissible period for submitting amendments as a matter of right pursuant to Section 21.23(a).

[8] The Commission found it necessary to "assure the public of an opportunity to comment on ownership changes as they specifically relate to individual applications for new stations." 1976 Part 21 Rule Making Order, 38 Rad. Reg. at 374. The public must have an opportunity to comment on the buyer's qualifications to be a licensee. *Id.* at 371. "We reaffirm our opinion that a substantial change in the ownership or control of an applicant (other than in the case of a pro forma change), or the substitution of one applicant for another, is an event which changes the identity of the applicant and requires a statutory public notice and a thirty day opportunity for public comment." *Id.* at 372.

[9] In addition, the acceptance for filing of KCSI's Application for Consent to Transfer of Control, FCC Form 704, for the ownership change from KCMC to Jones for the six authorizations was placed on public notice. This public notice explained that the FCC Form 704 was one component of a two-step process to transfer ownership of KCSI's MMDS applications and authorizations from KCSI to Jones. *See* Public Notice, D-412 (Dec. 16, 1987). No oppositions were received.

[10] We have no record of a petition to deny filed against any of KCSI's eleven above-referenced MMDS applications. Therefore, the Commission's discussions in Amendment of Section 0.291, Delegations of Authority to Chief, Common Carrier Bureau, 7 FCC 2d 352 (1967), and Service of Pre-Designation Amendments

to Applications, 8 Rad. Reg. 2d 1717 (1967), of the underlying purpose of this service requirement as it applies to parties who file petitions to deny are inapplicable.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-154

In the Matter of

Amendment of Section 73.202(b),	RM-4968
Table of Allotments,	RM-5068
FM Broadcast Stations.	RM-5360
(Conway, Hot Springs, Wrightsville,	RM-5439
Fairfield Bay, Perryville and	RM-5483
Maumelle, Arkansas)	RM-5495

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1988; Released: May 17, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it a Joint Petition for Partial Reconsideration filed by Noalmark Broadcasting Corporation (Noalmark), licensee of FM Station KLAZ, Hot Springs, Arkansas, Deborah Lee Vaile (Vaile), proponent for the Channel 290C2 allotment at Perryville, Arkansas, and Robert W. and Rosemary Holiday (Holiday), licensee of FM Station KFFB, Fairfield Bay, Arkansas, directed against the *Report and Order*, 2 FCC Rcd. 5118 (1987), in this proceeding

BACKGROUND

2. The *Report and Order* allotted Channel 290C2 to Perryville, Channel 245A to Maumelle and Channel 299A to Wrightsville, Arkansas as first local services to these communities. In order to allot Channel 290C2 to Perryville, it was necessary to deny a proposal by Noalmark to allot Channel 290C1 to Hot Springs and modify the Station KLAZ license to specify operation on Channel 290C1. The *Report and Order* also denied the proposal by Holiday to allot Channel 291C2 to Fairfield Bay and modify Station KFFB's license to specify operation on Channel 291C2.

3. The *Report and Order* preferred the allotment of Channel 290C2 to Perryville over the conflicting proposal for the Channel 290C1 upgrade at Hot Springs, premised on the fact that a Perryville allotment would provide a first local service to 1,058 persons while the upgrade at Hot Springs would provide a second aural service to an estimated 844 persons. Inasmuch as first local service and second aural service are given co-equal weight, the respective populations were the determinative factor. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In the Joint Petition for Reconsideration, the parties submitted an engineering exhibit demonstrating that the Hot Springs upgrade would, in fact, provide a second aural service to 1,607 persons. As such, the Hot Springs proposal is the preferred allotment under *Revision of FM Assignment Policies and Procedures, supra.*

DISCUSSION

4. After careful consideration of this matter, we concur with the engineering exhibit submitted with the Joint Petition for Reconsideration. Therefore, we will delete the Perryville allotment, allot Channel 290C1 to Hot Springs and modify the license of Station KLAZ to specify Channel 290C1 in lieu of Channel 292A.[1] Deletion of Channel 290C2 at Perryville will also permit us to allot Channel 291C2 to Fairfield Bay and modify the license of Station KFFB to specify operation on Channel 291C2 in lieu Channel 292A.[2] The Fairfield Bay allotment requires a site restriction of 16.5 kilometers (10.3 miles) northwest. [3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 1, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the communities listed below as follows:

Community	Channel No.
Fairfield Bay, Arkansas	291C2
Hot Springs, Arkansas	290C1
Perryville, Arkansas	—

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KLAZ, Hot Springs, Arkansas, IS MODIFIED to specify operation on Channel 290C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KFFB, Fairfield Bay, Arkansas, IS MODIFIED to specify operation on Channel 291C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the aforementioned Joint Petition for Reconsideration IS GRANTED to the extent indicated above.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The reference coordinates for this allotment are 34-30-19 and 93-05-06.

[2] The Fairfield Bay proposal was in conflict with a proposal for Channel 290A at Conway, Arkansas as a fifth local service. The *Report and Order* also denied the Conway proposal. Subsequently, the proponent for the Conway allotment submitted a letter stating that it will not oppose the upgrade at Fairfield Bay.

[3] The reference coordinates for this allotment are 35-43-34 and 92-11-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-249

In the Matter of

Amendment of Section 73.606(b), RM-6336
Table of Allotments,
TV Broadcast Stations.
(Cochran, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1988; Released: May 17, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is a request for the substitution of UHF Television Channel *29 for UHF Channel *15 at Cochran, Georgia, filed by the Georgia Public Telecommunications Commission (GPTC). GPTC requests modification of its license for Station WDCO, operating on Channel *15, to specify operation on the new channel. Also before the Commission is a statement in support of GPTC's proposal, filed by the United States Department of Defense (DOD).

2. WDCO's current operations are a cause of concern to DOD because they interfere with the detection capabilities of an early warning ballistic missile detection facility iocated at Warner Robins Air Force Base, Georgia. DOD states that the operation of Station WDCO adversely impacts the mission of the detection system. DOD's concerns would be exccerbated by the grant of GPTC's pending application for an increase in power at its present site. DOD and GPTC have reached an agreement, contingent on Commission approval, whereby GPTC will modify its station to operate on Channel *29, thereby insuring the integrity of the system's detection capabilities.

3. Channel *29 can be allotted to Cochran, Georgia, at GPTC's present transmitter site in accordance with our minimum distance separation rules, provided that the station operate with a plus offset, and that GPTC's present operations on Channel *15 are moved to Channel *29.

4. Accordingly, the Commisison believes it is appropriate to propose amending the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cochran, Georgia		*15 *29+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 8, 1988,** and reply comments on or before **July 25,1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Georgia Public Telecommunications Commission
c/o Theodore P. Frank, Esquire
Arent, Fox, Kintner, Plotkin, and Kahn
Washington Square
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Karl A. Kensinger, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-102

In the Matter of

Amendment of Section 73.202(b), RM-5124
Table of Allotments,
FM Broadcast Stations.
(Sedona, Arizona)

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration are the petitions for reconsideration and stay filed on behalf of American Aircasting Corporation (AAC), licensee of Station KQST(FM) (Channel 261A), Sedona, Arizona, of the *Report and Order* issued herein, 2 FCC Rcd 1180 (1987), which allotted Channel 298C to that community in response to a request filed on behalf of Margaret C. Durham of RAP Broadcasting, Inc. (RAP). Opposition comments were filed by RAP Broadcasting, Inc. (RAP). No reply comments were received.

2. In response to the *Notice* issued herein, AAC filed a counterproposal seeking the substitution of Channel 275C1 for Channel 261A and modification of its license accordingly. Alternatively, AAC requested the allotment of another Class A channel to Sedona in lieu of Channel 298C. AAC's proposal also sought the substitution of Channel 261C2 for Channel 275C2[1] at Flagstaff, Arizona, to accommodate its modification request.

3. AAC's counterproposal was returned as unacceptable for filing since, at that time, it failed to demonstrate a "compelling showing of need" to justify the substitution of channels at Flagstaff (see *Memorandum Opinion and Order*, 50 FR 47391, November 18, 1985). Moreover, Channel 261A was then reserved for Class A use only,[2] and thus could not be substituted for Channel 275 at Flagstaff.

4. As a result of subsequent Commission actions relaxing the "compelling showing of need" standard (see *Memorandum Opinion and Order*, 51 FR 36401, October 10, 1986), as well as the dereservation of the 20 Class A commercial channels for higher class use (see *First Report and Order*, 52 FR 8259, March 17, 1987), we ultimately accepted AAC's supplemental comments filed herein reciting those facts, as a new rule making proposal in a separate proceeding in MM Docket No. 87-76 (*Notice of Proposed Rule Making*, 2 FCC Rcd 1995 (1987)). That proceeding culminated in the grant of AAC's proposal (see *Report and Order*, 2 FCC Rcd 7421 (1987)).

5. Therefore, in view of the Commission's favorable action on AAC's proposal in MM Docket No. 87-76, its petitions for reconsideration and stay of this proceeding have been rendered moot. Thus, no useful purpose would be served by addressing the merits of those pleadings or any additional comments filed with respect thereto.

6. Accordingly, IT IS ORDERED, That the petitions for reconsideration and stay filed by American Aircasting Corporation in the above-captioned proceeding ARE DISMISSED AS MOOT.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 275C2 was allotted to Flagstaff in MM No. Docket 84-231.

[2] Pursuant to the provisions of former Section 73.206(a) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 25, 1988

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE STEERING COMMITTEE

A meeting of the Steering Committee of the Advisory Committee on Advanced Television Service will be held on:

May 1, 1988
2:00 P.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Approval of minutes of first meeting
2. Progress reports by Subcommittee chairmen
3. Discussion of draft interim report
4. Report on funding guidelines
5. Anticipated schedule for future work
6. Other business
7. Date and location of next Steering Committee meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Steering Committee Chairman.

Any questions regarding this meeting should be directed to William Hassinger at (202) 632-6460, or David Siddall at (202) 632-7792.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

	File Nos. 6337-CM-P-83, 6379-CM-P-83 thru 6393-CM-P-83, 6395-CM-P-83 thru 6411 CM-P-83, 6413-CM-P-83 thru 6416-CM-P-83, 6418-CM-P-83 thru 6429-CM-P-83, 6431-CM-P-83, 6432-CM-P-83,
Kansas City Southern Industries, Inc.	6434-CM-P-83, 6437-CM-P-83, 6439-CM-P-83 thru 6454-CM-P-83, 6456-CM-P-83,
For Authority to Construct and Operate Multichannel Multipoint Distribution Service Stations	6458-CM-P-83 thru 6460-CM-P-83, 6462-CM-P-83, 6463-CM-P-83, 6465-CM-P-83 thru 6487-CM-P-83, 166 6489-CM-P-83 thru 6505-CM-P-83, 6507-CM-P-83 thru 6520-CM-P-83, 6522-CM-P-83, 6523-CM-P-83, 6525-CM-P-83, 6526-CM-P-83, 16518-CM-P-83, 16520-CM-P-83 thru 16546-CM-P-83, 16548-CM-P-83 thru 16550-CM-P-83

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1988; **Released: May 11, 1988**

INTRODUCTION

1. This proceeding addresses pleadings relating to a proposed transfer of control of Multichannel Multipoint Distribution Service (MMDS) applications from Kansas City Southern Industries, Inc. (hereinafter referred to as KCSI) to Jones Lightwave, Ltd. (hereinafter referred to as Jones). On December 11, 1987, KCSI submitted amendments for the 166 above-referenced pending Multichannel Multipoint Distribution Service (MMDS) applications.[1] None of these applications have been selected for qualification review by lottery. On January 15, 1988, additional amendments were filed. On January 28, 1988, supplemental amendments were filed. On April 29, 1988 supplemental amendments were filed. On May 2, 1988, supplements to the supplemental amendments were filed. No opposition pleadings have been received.

BACKGROUND

2. On November 27, 1987, KCSI entered into an agreement with its wholly-owned subsidiary, Kansas City Microwave Communications, Inc. (herein- after referred to as KCMC), and Jones for a change of ownership from KCSI to Jones of all of its interests in MMDS applications and authorizations. KCSI proposes a two-step process: first, an assignment of its applications to KCMC, and then a transfer of control from KCMC to Jones.[2] KCSI states that this second step, the transfer of control to Jones, constitutes a substantial change in beneficial ownership or control of its MMDS applications.

DISCUSSION

3. Rule on Application Ownership Changes. Pursuant to Section 21.29 of the Commission's Rules, 47 C.F.R. § 21.29,[3] the Commission was provided written notification of the existence of the ownership change agreement;[4] a copy of the agreement between KCSI, KCMC, and Jones; and also an itemized accounting which demonstrates that the consideration is limited to "those legitimate and prudents costs directly assignable to the engineering, preparation, filing and advocacy" incurred by KCSI for its MMDS applications.

4. We find that the itemized accounting demonstrates that the consideration is reasonable and does not appear to have provided a financial incentive to delay grant of the requested MMDS authorizations or to unreasonably profit from our application processing procedures.[5]

5. In addition, on the basis of the information before us, we find pursuant to Section 21.29(e) that the ownership change agreement is consistent with the public interest.

6. Rule on Application Amendments. Section 21.23 of the Commission's Rules, 47 C.F.R. § 21.23, applies to these proposed amendments. Because none of the 166 above-referenced MMDS applications was tentatively selected by the random selection process for qualification review, Section 21.23(b) does not apply. Instead, Section 21.23(a) applies.[6] Therefore, while compliance with Section 21.29 must be demonstrated, there is no requirement to demonstrate good cause for application amendment. As previously discussed, the basic requirements of Section 21.29 have been met.

7. Pursuant to Section 21.23(c), this substantial change in ownership is a major amendment and subject to the "cut-off" procedures of Section 21.31, 47 C.F.R. § 21.31, unless it is demonstrated that the ownership change "is for legitimate business purposes other than the acquisition of applications" pursuant to Section 21.23(c)(6), 47 C.F.R. § 21.23(c)(6). KCSI explained that it has decided to quit the MDS business in order to concentrate on its transportation business concerns. We find that KCSI has adequately demonstrated that this substantial change in beneficial ownership is for legitimate business purposes other than the acquisition of applications, reflecting changing service demands and economic conditions. *1976 Part 21 Rule Making Order*, 38 Rad.Reg. 2d at 373. Therefore, these application amendments are not considered to be major amendments, and thus, are not subject to the "cut-off" provisions of Section 21.31. *Id.* ; *see Airsignal International, Inc.*, 81 FCC 2d 472 (1981).

8. KCSI requested waiver of the service requirements of Sections 21.23(b) and 21.23(e). One of the primary underlying purposes of this service requirement is to provide actual notice to any potential interested parties of the substitution of one applicant for another applicant in order to provide the public with an opportunity to comment on the potential public benefits or detriments of the proposed ownership change and the qualifications of the prospective applicant. *See 1976 Part 21 Rule Making Order*, 38 Rad. Reg. at 363-374.[7] Public notices appeared on

December 23, 1987 and January 20, 1988. *See* Public Notice, Report No. D-413 (Dec. 23, 1987); Public Notice, Report No. D-419 (Jan. 20, 1988).[8] In these circumstances,[9] the underlying purpose of the service requirement would not be frustrated by grant of the requested waiver as it concerns the amendments for the change in ownership from KCSI to Jones. *See* Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19.

CONCLUSION AND ORDERING CLAUSES

9. With regard to the above-referenced applications, KCSI adequately demonstrated compliance with the requirements of Section 21.23(a) and Section 21.23(c). KCSI was granted a waiver of the service requirements of Section 21.23. KCSI also demonstrated basic compliance with Section 21.29.

10. Accordingly, IT IS ORDERED that the request for leave to amend the 166 above-referenced MMDS applications IS GRANTED and the ownership change amendments ARE ACCEPTED.

11. This order is issued pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b) of the Commission's Rules, 47 C.F.R. § 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

APPENDIX A

The above-referenced MMDS applications were filed by KCSI proposing to provide service in the following 166 service areas:

Abilene, Texas
Albany, New York
Albuquerque, New Mexico
Alexandria, Louisiana
Allentown, Pennsylvania
Amarillo, Texas
Anchorage, Alaska
Atlanta, Georgia
Atlantic City, New Jersey
Augusta, Georgia
Austin, Texas
Bakersfield, California
Baltimore, Maryland
Baton Rouge, Louisiana
Beaumont, Texas Fort
Billings, Montana
Binghamton, New York
Birmingham, Alabama
Bloomington, Indiana
Boston, Massachusetts
Brownsville, Texas
Bryan, Texas
Burlington, North Carolina
Butte, Montana
Cedar Rapids, Iowa
Champaign, Illinois
Charleston, South Carolina
Charlotte, North Carolina
Chattanooga, Tennessee
Chicago, Illinois
Cincinnati, Ohio
Cleveland, Ohio
Colorado Springs, Colorado
Columbia, Missouri
Columbia, South Carolina
Columbus, Ohio
Corpus Christi, Texas
Dallas, Texas
Danville, Virignia
Davenport, Iowa
Lansing, Michigan
Laredo, Texas
Las Vegas, Nevada
Lawrence, Kansas
Lawton, Oklahoma
Lexington, Kentucky
Lincoln, Nebraska
Little Rock, Arkansas
Los Angeles, California
Louisville, Kentucky
Mansfield, Ohio
McAllen, Texas
Melbourne, Florida
Memphis, Tennessee
Miami, Florida
Midland, Texas
Milwaukee, Wisconsin
Minneapolis, Minnesota
Mobile, Alabama
Monroe, Louisiana
Montgomery, Alabama
Nashville, Tennessee
New Bedford, Massachusetts
New Haven, Connecticut
New Orleans, Louisiana
New York, New York
Norfolk, Virginia
Ocala, Florida
Odessa, Texas
Oklahoma City, Oklahoma
Omaha, Nebraska
Orlando, Florida
Owensboro, Kentucky
Pensacola, Florida
Peoria, Illinois
Philadelphia, Pennsylvania
Phoenix, Arizona
Pine Bluff, Arkansas
Pittsburgh, Pennsylvania
Portland, Oregon
Providence, Rhode Island
Provo, Utah
Pueblo, Colorado
Raleigh, North Carolina
Rapid City, South Dakota
Reno, Nevada
Richmond, Virginia
Rochester, Minnesota
Rochester, New York
Rockford, Illinois
Salinas, California
Salt Lake City, Utah
San Antonio, Texas
San Diego, California
Santa Barbara, California
Savannah, Georgia
Scranton, Pennsylvania
Seattle, Washington
Shreveport, Louisiana
Sioux Falls, South Dakota
Spokane, Washington
Springfield, Illinois
Springfield, Massachusetts
St. Joseph, Missouri
St. Louis, Missouri
Stuart, Florida
Syracuse, New York
Tallahassee, Florida
Tampa, Florida
Terre Haute, Indiana
Texarkana, Texas
Toledo, Ohio
Topeka, Kansas
Tucson, Arizona
Tulsa, Oklahoma
Tyler, Texas
Victoria, Texas
Washington, D.C.
Waterloo, Iowa
Wichita, Kansas
Wichita Falls, Texas
Worchester, Massachusetts
Yakima, Washington
Youngstown, Ohio
Dayton, Ohio
Daytona Beach, Florida
Decatur, Illinois
Denver, Colorado
Decatur, Illionis
Denver, Colorado
Des Moines, Iowa
Detroit, Michigan
Dothan, Alabama
Enid, Oklahoma
Eugene, Oregon
Fairbanks, Alaska
Flint, Michigan
Fort Myers, Florida
Smith, Arkansas
Fort Wayne, Indiana
Fresno, California
Gainesville, Florida Bismarck, North Dakota
Grand Rapids, Michigan
Great Falls, Montana
Greeley, Colorado
Greensboro, North Carolina
Greenville, South Carolina
Harrisburg, Pennsylvania
Hartford, Connecticut
Honolulu, Hawaii
Houma, Louisiana
Houston, Texas
Huntsville, Alabama
Indianapolis, Indiana
Jackson, Mississippi
Jacksonville, Florida
Johnson City, Tennessee
Joplin, Missouri
Kalamazoo, Michigan
Kankakee, Illinois
Key West, Florida
Killeen, Texas
Knoxville, Tennessee
Lake Charles, Louisiana
Lakeland, Florida

FOOTNOTES

[1] A list of the service areas for the 166 above-referenced MMDS applications is provided at Appendix A.

[2] On November 30, 1987, an Application for Consent to Assignment, FCC Form 702, File No. 50030-CM-AP-88, from KCSI to KCMC and an Application for Consent to Transfer of Control, FCC Form 704, File No. 50029-CM-AP-88, from KCMC to Jones were filed for six of KCSI's MMDS authorizations. On December 3, 1987, assignments of the six authorizations were approved. On February 22, 1988, the transfers of control of the six authorizations were approved. On May 9, 1988, the Commission staff extended the deadline for consummation of this transfer of control until June 24, 1988.

[3] Section 21.29(a) of the Commission's Rules, 47 C.F.R. § 21.29(a) provides *inter alia* :

> Except as provided in paragraph (b) of this section, applicants or any other parties in interest to pending applications shall comply with the provisions of this section whenever: (1) They participate in any agreement (or understanding) which involves any consideration promised or received, directly or indirectly, including any agreement (or understanding) for merger of inte- rests or the reciprocal withdrawal of applications; and (2) The agreement (or understanding) may result in either: (i) A proposed substantial change in beneficial ownership or control (*de jure* or *de facto)* of an applicant such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under Section 310(d) of the Communications Act of 1934 [47 U.S.C. 310(d)] . . .

[4] The Application for Consent to Assignment (FCC Form 702) and the Application for Consent to Transfer of Control (FCC Form 704), filed on November 30, 1987, disclosed the existence of the agreement executed on November 27, 1987, together with the names of the participants, and the agreement's subject matter.

[5] As the Commission stated when it adopted Section 21.29, "[O]ur policy should be clearly understood as a general procedural rule to focus upon the reasonableness of any consideration promised or received since this would concern the common financial incentives to delay grants or to unreasonably profit from our administrative process." Amendment of Parts 1 and 21 of the Commission's Rules and Regulations applicable to the Domestic Public Radio Services (other than Maritime Mobile), 38 Rad. Reg. 2d 363, 372 (1976) (hereinafter cited as 1976 Part 21 Rule Making Order).

[6] Section 21.23(a) of the Commission's Rules, 47 C.F.R. § 21.23(a) provides:

> Any pending application may be amended as a matter of right if the application has not been designated for hearing or for comparative evaluation pursuant to § § 21.35, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate. An MMDS application tentatively selected by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate.

[7] The Commission found it necessary to "assure the public of an opportunity to comment on ownership changes as they specifically relate to individual applications for new stations." 1976 Part 21 Rule Making Order, 38 Rad. Reg. at 374. The public must have an opportunity to comment on the buyer's qualifications to be a licensee. *Id.* at 371. "We reaffirm our opinion that a substantial change in the ownership or control of an applicant (other than in the case of a pro forma change), or the substitution of one applicant for another, is an event which changes the identity of the applicant and requires a statutory public notice and a thirty day opportunity for public comment." *Id.* at 372.

[8] In addition, the acceptance for filing of KCSI's Application for Consent to Transfer of Control, FCC Form 704, for the ownership change from KCMC to Jones for the six authorizations was placed on public notice. This public notice explained that the FCC Form 704 was one component of a two-step process to transfer control of KCSI's MMDS applications and authorizations from KCSI to Jones. *See* Public Notice, D-412 (Dec. 16, 1987). No oppositions were received.

[9] We have no record of a petition to deny filed against any of KCSI's eleven above-referenced MMDS applications. Therefore, the Commission's discussions in Amendment of Section 0.291, Delegations of Authority to Chief, Common Carrier Bureau, 7 FCC 2d 352 (1967), and Service of Pre-Designation Amendments to Applications, 8 Rad. Reg. 2d 1717 (1967), of the underlying purpose of this service requirement as it applies to parties who file petitions to deny are inapplicable.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

COMMENT FILING DATES ESTABLISHED ON NECA'S REQUEST FOR AUTHORIZATION TO PERFORM CERTAIN SERVICES

Released: May 4, 1988

On March 25, 1988, the National Exchange Carrier Association, Inc. (NECA) requested authorization[1] "to offer certain customized interstate services similar to its access charge functions on a compensatory basis."[2] NECA states that it frequently receives requests to provide "additional services which could minimize the impact of changes, provide cost efficiencies, and/or reduce administrative burdens for its member companies and other Industry segments." [3] However, it is not clear to NECA whether the authorization that is contained in Section 69.603 of the Commission's Rules includes "interstate services tailored for special requests."[4]

As a consequence NECA requests FCC authorization for "customized services"[5] that would include: "(1) training and tariff administration; (2) filing of non-Association access tariffs; (3) access service order coordination; (4) Tariff No. 4 services and (5) other services similar to those described in Section 69.603 of the Commission's Rules."[6]

In response to requests from the Common Carrier Bureau for more detailed information with respect to the requested authorizations, NECA stated that the first two requests (*i. e.*, training, tariff administration and the filing of "non-Association access tariffs) were limited to exchange carrier access tariffs.[7] As examples of these activities NECA stated that, if authorized, those activities would include "interpretative and background materials, terms and conditions tariff updates . . . [and] tariff filing services for [exchange carrier] access tariffs."[8]

In the third requested area, "access service order coordination," the authorization would, for example, encompass:

> 1) Provision and ongoing maintenance of a distribution list for ICs containing current names and addresses of ECs by service territory, along with related information such as contact names and telephone numbers.
>
> 2) Distribution of access service requests (ASRs) from the IC to the ECs within the territory the IC is ordering access service. The scope of this activity could vary from simply mailing the ASRs on behalf of the IC to assisting the IC in determining which ECs must receive the ASRs.
>
> 3) ASR follow-up activities to confirm EC receipt of the order. This could include responding to EC/IC questions regarding the ASR and service date.[9]

The fourth area, "Tariff No. 4 services," would eventually provide requestors with "on-line" access to an electronic data base that would constitute "an encyclopedia of useful data describing the location and technical capabilities of every wire center in the United States, as well as information on interconnection agreements between ECs."[10]

The fifth subject area, "other services similar to those described in Section 69.603," was intended by NECA to cover "additional requests to provide customized interstate services" since "activities similar to those already authorized in Section 69.603 provides a reasonable standard for areas in which NECA could offer additional customized services."[11] NECA's request for this type of authorization stems from its desire "to avoid the inefficiency of having to initiate a formal section 69.603(a) authorization process for each new service variation that may develop."[12]

Interested parties wishing to file comments on NECA's requested authorization may do so by filing their comments on or before **May 16, 1988.** Reply comments may be filed on or before **May 23, 1988.** An original and five copies of all comments and reply comments should be filed with Mr. Kent Nilsson, Room 544, Federal Communicatins Commission, 1919 M Street, N.W., Washington, D.C. 20554. Parties wishing to examine the letters from NECA to the FCC that are referenced in this notice may do so by contacting Mr. Nilsson at the above captioned address.

For further information, contact Mr. Kent Nilsson, Policy and Program Planning Division, Common Carrier Bureau, at (202)-632-6363.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] This authorization was requested pursuant to Section 69.603 of the Commission's Rules. *See generally* 47 C.F.R. § 69.603 (1987).

[2] Letter dated March 25, 1988 from Bruce Baldwin, President, NECA, to Gerald Brock, Chief, Common Carrier Bureau, at 1.

[3] *Id.*

[4] *Id.*

[5] The customized services would be provided "to individual clients or groups on a compensatory fee basis." *Id.* at 2.

[6] *Id.*

[7] Letter from James W. Frame, NECA Director - Tariff & Regulatory Matters, to Kent R. Nilsson, Common Carrier Bureau, dated April 6, 1988, at 1 [" *April 6 Letter* "].

[8] *Id.*

[9] Letter from James W. Frame, NECA Director - Tariff & Regulatory Matters, to Kent R. Nilsson, Common Carrier Bureau (dated April 20, 1988)[" *April 20 Letter*] at 1.

[10] April 6 Letter at 1-2. NECA stated that as of April, 1988, FCC Tariff 4 contained more than 18,000 pages of material. Id. at 2. FCC Tariff 4 is updated on a monthly basis by NECA on or about the 15th day of each month. See id.

[11] April 20 Letter at 2.

[12] Id.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company

Transmittal Nos. 130 and 155

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 5, 1988 ; Released: May 6, 1988

By the Chief, Common Carrier Bureau:

1. On February 8, 1988, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (collectively US West) jointly filed the captioned transmittal to offer a new interstate special access service, to be effective on May 8, 1988. The new service, called Command A Link Network Reconfiguration Service (CAL), would enable a subscriber to rearrange its special access lines through a remote terminal with dial-up access to certain central office facilities, without active intervention by the local exchange carrier (LEC). US West Transmittal at 1-1 to 1-2. MCI Telecommunications Corporation (MCI) has filed a petition to reject or, in the alternative, suspend and investigate,[1] and US West has replied.[2] On April 22, 1988, US West filed Transmittal No. 155, reducing the scope of CAL services as proposed in Transmittal No. 130 in order to preclude certain technical problems for interexchange carriers arising from customer initiated CAL reconfigurations.

2. MCI contends, first, that CAL constitutes an enhanced service within the meaning of Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a), in that it "involve[s] subscriber interaction with stored information" and, therefore, that US West must either file a plan for Comparably Efficient Interconnection (CEI) or offer CAL through a structurally separate subsidary, pursuant to the Commission's *Third Computer Inquiry*. [3] MCI Petition at 3-4. Second, MCI argues that if a CAL special access customer uses MCI's interexchange service, a customer-initiated reconfiguration could disrupt MCI's trouble resolution and network maintenance procedures. *Id.* at 4-7. In particular, MCI contends that disconnection of a DS0 special access line through CAL could cause an associated MCI switch to alarm and seize the switch port indefinitely. *Id.* at 8-9. Third, MCI asserts that, even if CAL Service were not otherwise objectionable, US West's Description and Justification is incomplete and defective in a number of respects, such as inadequate cost support and premature inclusion of CAL facility costs in current rates for other services. *Id.* at 4-7.

3. US West replies, first, that CAL is a basic service, as demonstrated by analogy to a Centrex feature that the Commission has previously characterized as basic. US West Reply at 5-7. Second, US West replies that CAL will not make MCI's trouble resolution and network maintenance more difficult because US West will issue detailed preventive instructions to its CAL customers, whom it expects to be sophisticated telecommunications users. *Id.* at 8-12. Finally, US West replies that its cost support is adequate and that its previous and proposed allocations of facility costs to CAL and other services are appropriate. *Id.* at 13-14.

4. On April 22, 1988, after US West filed its reply, it filed Transmittal No. 155, reducing the scope of CAL service as proposed in Transmittal No. 130 in order to preclude the switch port seizure problem raised in MCI's petition.

5. The Common Carrier Bureau has reviewed US West's filings, MCI's petition, and US West's reply. We find that no compelling argument has been presented that the proposed tariff is patently unlawful so as to require rejection, and that an investigation of the tariff is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition filed by MCI Telecommunications Corporation against Tariff F.C.C. No. 1, Transmittal No. 130 of Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject or, in the Alternative, To Suspend and Investigate, filed Feb. 23, 1988 (MCI Petition).

[2] Reply of Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company to MCI's Petition To Reject or, in the Alternative, To Suspend and Investigate Transmittal No. 130, filed Mar. 4, 1988 (US West Reply).

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 FCC 2d 958 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166,

In the Matter of

Investigation of Interstate Access Tariff Non-Recurring Charges — Phase I, Part 2 and Part 3

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 7, 1988; Released: May 6, 1988

By the Commission: Commissioner Dennis concurring and issuing a statement at a later date.

I. INTRODUCTION

1. On June 11, 1987, this Commission released a Memorandum Opinion and Order which addressed certain rate level and rate structure issues concerning non-recurring charges (NRCs) for both switched and special access service.[1] We concluded in that Order, among other things, that non-recurring costs, which historically have been recovered through a combination of non-recurring and recurring charges, henceforth should be fully recovered through NRCs alone. Recognizing that abrupt increases in currently below-cost NRCs could create dislocations for the local exchange carriers (LECs) and their access customers, we encouraged transitional approaches to the new rates. We refused, however, to prescribe any specific, uniform plan, because the various LECs were at different stages of achieving full-cost NRCs. In particular, we denied a request by Western Union Telegraph Company (Western Union)[2] to prescribe immediate disaggregation of NRC rate structures for every LEC in order to reflect purported cost differentials within particular services.

2. Western Union has filed a petition for partial reconsideration or clarification of the *NRC Order*. In this Order, we deny Western Union's petition.

II. BACKGROUND AND PLEADINGS

3. In the pleadings which culminated in our *NRC Order*, Western Union argued that this Commission's policy of imposing cost recovery on the cost-causers requires that the differing non-recurring costs incurred by LECs in certain access service functions should be embodied in the corresponding NRCs. This could be achieved, Western Union maintained, only by disaggregating NRCs down to the level at which these cost variations appear as distinct items. [3]

4. In its opposition, Western Union set forth five types of cost differentials and savings which it claimed would justify mandatory disaggregation: installations of particular services, such as metallic, 2-wire voicegrade, *etc.* ; installations of multiple circuits at the same time between the same locations; installations involving one central office; installations involving only one end of the circuit, *i. e.*, one channel termination; and large interexchange carrier office moves. *Id.* at 11-19.[4]

5. In the *NRC Order*, we declined to require the disaggregation urged by Western Union, because, among other things, the incomplete and diverse nature of the various LECs' transitions to full cost NRCs made voluntary disaggregation more reasonable. 2 FCC Rcd at 3498.

6. On July 13, 1987, Western Union filed its petition for partial reconsideration or clarification of the *NRC Order*, asserting that this Commission's conclusion regarding prescribed disaggregation was arbitrary and unsupported by the record. It also challenged this Commission's then pending proposal to prohibit any rate structure changes in annual access filings.[5] Accordingly, it requested as alternative relief a waiver of any such future prohibition in Part 69 as applied against NRC rate structure proposals. The substantive arguments in Western Union's petition are virtually indentical to its previously filed opposition.

7. Oppositions to Western Union's petition on the merits were filed by all of the Regional Bell Operating Companies, except US West and Pacific Telesis,[6] and by Cincinnati Bell. In addition, as part of its opposition, NYNEX argued that the petition should be denied as to reconsideration, pursuant to Section 1.429(b) of this Commission's Rules, 47 C.F.R. § 1.429(b), for failure to raise any new facts.

8. All of the LEC oppositions stress that the transition to full recovery of NRCs is so incomplete that any mandatory disaggregation would be altogether premature. They argue, moreover, that with virtually all of any given LEC's NRCs still below cost, a discount for relative cost savings would simply lower that LEC's recovery even further below full cost. They also assert that the various LECs are at such different stages of the transition or are otherwise in such different circumstances that a generic rate structure prescription for NRCs would be inappropriate. Nevertheless, all of these LECs except Bell Atlantic and Pacific Bell express a willingness to adopt at least some of Western Union's disaggregation proposals in the future. Bell Atlantic and Pacific Bell do not explicitly refuse to do so.[7]

9. MCI filed comments supporting Western Union's petition, maintaining that the recent large increases in NRCs and the unreliable cost data justifying them render disaggregation essential to achieve rates which are more cost-based.

III. DISCUSSION

10. Western Union has presented nothing which persuades us to alter our previous conclusion,[8] and we therefore deny its petition for reconsideration of the *NRC Order*.[9]

11. In essence, Western Union asks that we impose on the LECs a relatively complex rate structure to be applied indiscriminately to any LEC. It asserts that there are legitimate cost savings resulting from particular installations that are not now reflected in the LECs' tariffed rates. In response, the LECs repeat their contention that until NRCs are set to recover the full cost of the underlying non-recurring activities, any mandatory disaggregation is premature. In other words, the LECs contend that

with each company at a different stage of transition to full cost recovery, a generic rate structure prescription such as that proposed by Western Union would be arbitrary.[10] At the same time, most of the LECs that filed pleadings in response to the reconsideration petition here express a willingness to adopt these kinds of rate structure modifications once their individual transitions to full cost recovery have been completed.

12. After reviewing Western Union's petition and the responsive pleadings, we affirm our decision in the *NRC Order* to refrain from requiring the LECs to disaggregate their rate structures to offer the specific "discounts" proposed by Western Union.[11] The *NRC Order* already requires the LECs to establish NRCs that recover the full cost of providing, terminating or modifying an access service.[12] Thus the LECs are already obligated to set NRCs that recover the costs of the associated non-recurring activities.[13]

IV. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 204(a), 205 and 405 of the Communications Act, 47 U.S.C. §§4(i), 4(j), 201(b), 204(a), 205 and 405, that the Western Union Telegraph Company Petition for Partial Reconsideration or Clarification, filed July 13, 1987, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order*). The *NRC Order* also resolved an issue raised in Part 2 of Phase I of the Docket 85-166 proceeding, involving NRCs charged by Pacific Bell. *See NRC Order*, 2 FCC Rcd at 3502-03; *see also* FCC Public Notice, "Common Carrier Bureau Requests Comments on Issue Concerning Non-Recurring Charges (CC Docket No. 85-166, Phase I, Part 2)," Mimeo No. 5420, released June 26, 1986.

[2] Western Union has since reorganized and is now known as "Western Union Corporation."

[3] Western Union Opposition to Direct Cases, filed Mar. 14, 1986 (Western Union Opposition) at 9-11.

[4] Western Union's pleadings occasionally refer to access service in general, with no distinction between switched and special access. Most of its concrete examples, however, appear to involve only special access.

[5] *See* Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It with Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Notice of Proposed Rule Making, 2 FCC Rcd 2673 (1987). This proposal was in fact adopted on August 18, 1987, as an amendment to 47 C.F.R. § 69.3(a). CC Docket No. 87-113, Report and Order, 2 FCC Rcd 6447 (1987) (*Part 69 Conformance Order*).

[6] Pacific Bell filed an opposition.

[7] Many of the LECs also dispute Western Union's claims of cost savings in particular areas, such as multiple special access lines or large interexchange carrier office moves.

[8] Regarding NYNEX's request that we deny Western Union's petition for reconsideration pursuant to Section 1.429(b) of this Commission's Rules, 47 C.F.R. § 1.429(b), for failure to present any new facts, we note that this rule applies only to Rule Making proceedings, and the correct rule on reconsideration applicable to the instant proceeding in Section 1.106, 47 C.F.R. § 1.106. *See* 47 C.F.R. § 1.399 (regarding the applicability of Section 1.429(b)). Moreover, there is nothing in either rule which restricts the grounds for reconsideration to new facts, and Western Union did not base its petition on such grounds.

[9] In addition, we deny as moot Western Union's request in its petition for a waiver of the then proposed prohibition on rate structure changes in the annual access tariff filings. As noted previously, we adopted that proposal in CC Docket No. 87-113 and fully considered all relevant issues in that proceeding. *See* note 5, *supra*. With respect to future filings, any LEC that wishes to make NRC rate structure revisions in its annual access filing may seek a waiver under the standards set forth in the *Part 69 Conformance Order*, 2 FCC Rcd at 6458.

[10] In the *NRC Order*, we declined to prescribe a transitional period or particular transitional approach for increasing NRCs to recover the full cost of the associated non-recurringactivities. We encouraged the LECs to consider various means to moderate rate increases designed to bring NRCs to full cost recovery levels. We indicated in response to Western Union's proposals that if legitimate cost savings resulted from certain types of installations, such as multiple installations, carriers should file rates which reflect those cost savings. *NRC Order*, 2 FCC Rcd at 3502.

[11] We need not take any position at this time on the merits of the particular disaggregations proposed by Western Union.

[12] *NRC Order*, 2 FCC Rcd at 3501-02.

[13] We indicated that NRCs that recover less than the underlying costs and thus shift costs to recovery through recurring charges may be found unlawful. *Id.* at 3502.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-309

In the Matter of

Amendment of Section 73.606(b) RM-5807
Table of Allotments,
Television Broadcast Stations.
(Montrose and Scranton, Pennsylvania)

ERRATUM

Released: May 19, 1988

On March 7, 1988, the Commission released the above-captioned Report and Order, DA 88-282. The Report and Order is corrected as follows:

Paragraph 5 - The last 5 1/2 lines should not be italicized.

Paragraph 6 - The first and second sentences are corrected to read:

> It is Commission policy not to reallocate a channel in which interest has been expressed, absent a sufficient reason to do so and we find that petition has failed to provide such a showing. *See* , *Fond du Lac* and Sheboyan, Wisconsin, *supra,* and cases cited therein.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXCHANGE CARRIER ASSOCIATION, INC.
Tariff F.C.C. No. 1

Transmittal No. 220

ORDER

Adopted: April 29, 1988; Released: May 19, 1988

By the Chief, Common Carrier Bureau:

1. On June 30, 1987, we released a Memorandum Opinion and Order[1] suspending Tariff F.C.C. No. 1, Transmittal No. 220, filed by the National Exchange Carrier Association, Inc. (NECA), and initiating an investigation of that transmittal. Transmittal No. 220 was filed on behalf of Puerto Rico Telephone Company (PRTC). PRTC proposed to provide Feature Group B (FGB) access at discounted rates to multiple interexchange carriers (ICs) in Puerto Rico. The tariff was scheduled to become effective on July 1, 1987. PRTC filed an application for review of the Bureau's suspension Order. No responsive pleadings were filed.

2. By Transmittal No. 267, filed November 2, 1987, NECA withdrew its Transmittal No. 220.[2] It filed instead Transmittal No. 274, later modified by Transmittal No. 285, to provide the same services it had sought to provide under the earlier filing. On February 12, 1988, we released an Order denying petitions to reject, suspend or investigate those tariff revisions. [3] Transmittal No. 220 having been withdrawn by the applicant, the Bureau's investigation of that transmittal is moot.

3. Accordingly, IT IS ORDERED that the investigation of Exchange Carrier Association, Inc., Tariff F.C.C. No. 1, Transmittal No. 220, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Exchange Carrier Association, Inc., Tariff F.C.C. No. 1, Transmittal No. 220, Memorandum Opinion and Order, DA 87-1966, released June 30, 1987.

[2] By a notice filed December 28, 1987, PRTC withdrew its application for review.

[3] Exchange Carrier Association, Inc., Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 274 and 285, Order, DA 88-178, released Feb. 12, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-202

In the Matter of

TeleSTAR, INC. File Nos. 1743 CF-P-85 through 1757 CF-P-85

For Authority to Construct
New Common Carrier Point-to-Point
Microwave Radio Stations

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1988; Released: May 19, 1988

By the Commission: Commissioner Dennis concurring in the result.

I. BACKGROUND

1. This proceeding involves 15 applications filed by TeleSTAR, Inc. for authority to construct common carrier microwave radio stations connecting Salt Lake City, Utah and Denver, Colorado. TeleSTAR constructed substantial parts of its proposed system without construction permits, thereby violating 47 C.F.R. § 21.3. In pertinent part, section 21.3 provides that:

> No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part.

In an Initial Decision, ALJ Walter C. Miller denied TeleSTAR's applications, finding that TeleSTAR willfully violated section 21.3 and intentionally misrepresented material facts to the Commission about its premature construction. *TeleSTAR Inc.*, FCC 86D-30 (Apr. 18, 1986). The Review Board affirmed the ALJ's decision, concluding that TeleSTAR willfully violated section 21.3 and that "its principals made serious and numerous misrepresentations to the FCC, and displayed an egregious lack of candor in this proceeding." *TeleSTAR, Inc.*, 2 FCC Rcd 5, 13 ¶ 24 (1987).

2. On December 3, 1987, the Commission remanded this proceeding for further evidentiary hearings. *TeleSTAR, Inc.* (remand order), 2 FCC Rcd 7352 (1987). We said that any supplemental initial decision would by appealable directly to the Commission. 2 FCC Rcd at 7356 ¶ 27. On December 28, 1987, TeleSTAR filed a Petition for Leave to File Petition for Reconsideration, and a Petition for Reconsideration. Comments were filed January 12, 1988 by the Common Carrier Bureau; and a Response was filed January 13, 1988 by Western Tele-Communications, Inc. (WTCI).

3. On January 5, 1988, Gregory J. Vogt, Chief of the Enforcement Division of the Common Carrier Bureau, requested the General Counsel to meet with the parties in this proceeding to consider the possibility of reaching a negotiated settlement. On February 4, 1985, representatives of the Office of General Counsel met with the parties to explore the possibility of the parties negotiating a settlement. As a result of the February 4 meeting, the parties agreed to attempt to draft a memorandum of understanding concerning a settlement of this proceeding, and we deferred consideration of TeleSTAR's Petition for Reconsideration pending a further report from the parties. In a letter dated March 11, 1988, Mr. Vogt advised the General Counsel that there were "irreconcilable differences" among the parties and that the settlement negotiations "have broken down." We immediately resumed consideration of TeleSTAR's Petition for Reconsideration on an expedited basis, consistent with the priority of other matters and the efficient disposition of the Commission's business.

4. While TeleSTAR's Petition for Reconsideration was pending, the ALJ proceeded with the remanded proceeding. In *TeleSTAR, Inc.*, FCC 88M-1113, issued April 13, 1988 and released April 15, 1988, the ALJ dismissed TeleSTAR's applications for failure to prosecute because of TeleSTAR's refusal to present evidence in the remanded hearing. On April 14, 1988, TeleSTAR filed an Urgent Request for Expedited Action asking the Commission to rule on its Petition for Reconsideration before the issuance of the ALJ's dismissal order. TeleSTAR's Urgent Request will be dismissed as moot because it was not filed until after the issuance of the dismissal order. On April 22, 1988, TeleSTAR filed an Appeal of the dismissal order.

5. TeleSTAR argues that in remanding this proceeding the Commission erred in its allocation of the burden of proof. TeleSTAR refused to present further evidence and it urges the Commission to grant its applications and impose a monetary forfeiture. It asserts, however, that if the Commission is unable to find that TeleSTAR is qualified to be a licensee, the Commission should promptly deny TeleSTAR's applications, so that it can appeal the Commission's determination. In its Appeal of the dismissal order, TeleSTAR again argues that the record is complete and that the Commission erred in assigning the burden of proof and in remanding this proceeding.

II. DISCUSSION

A. *The Remand Order*

6. We do not lightly deny any application. In the remand order we found there are "conflicts and gaps . . . which make it impossible to resolve this proceeding with sufficient certitude to determine whether we should grant or deny TeleSTAR's applications." 2 FCC Rcd at 7353 ¶ 10. It was, therefore, with an abundance of caution, and because of the need for new, competitive common carrier service, that we remanded this proceeding for additional hearings to afford the parties an opportunity to fill in gaps in the record, and to allow TeleSTAR an opportunity to establish its qualifications. The ALJ was directed to take further evidence concerning: (1) how TeleSTAR's principals developed their incorrect understandings of the Com-

mission's rules; (2) their involvement in the inconsistent and incorrect statements made to the Commission; and (3) when they became aware of the Commission's prohibition against premature construction. We anticipated that such evidence, if provided, could help determine TeleSTAR's qualifications.

7. Although we specifically found that TeleSTAR failed to establish its qualifications to be a licensee on the basis of the present record, TeleSTAR refused to present further evidence. The dismissal of TeleSTAR's applications moots its Petition for Reconsideration. However, in the interest of ensuring that TeleSTAR has a full opportunity to have its arguments reviewed by the Commission, we will grant the Petition for Leave to File Petition for Reconsideration. We will consider both the Petition for Reconsideration and the Appeal of the ALJ's dismissal order. We will reexamine the Board's Decision and resolve this proceeding, as TeleSTAR requests, on the basis of the current record, TeleSTAR's Petition for Reconsideration, the Application for Review, and the related pleadings listed in the remand order. 2 FCC Rcd at 7352 ¶ 1.

8. We recognize that TeleSTAR provided affirmative evidence supporting its contentions. However, that evidence must be evaluated in light of circumstantial and other conflicting evidence in the record. When consideration is given to the full record in this proceeding, the preponderance of the evidence establishes that TeleSTAR has both misrepresented material facts and exhibited a lack of candor in its prosecution of these applications. As set forth below, TeleSTAR failed to establish both that it is qualified to be a licensee and that the public interest will be served by the grant of its application. *Steadman v. United States*, 450 U.S. 91, 100-02 (1981). Moreover, in light of TeleSTAR's failure to supplement the record, the ALJ properly dismissed its applications for failure to prosecute, providing a separate and distinct basis for denying TeleSTAR's applications.

B. *TeleSTAR's Qualifications*

9. TeleSTAR argues in both its Petition for Reconsideration and its Appeal that the Commission erred in holding that it had the burden of proof with respect to the factual issues. TeleSTAR argues that the ALJ failed to provide specific demeanor findings in support of his candor conclusions; that its principals did not understand the Commission's processes; that its principals believed that TeleSTAR could begin constructing facilities immediately after completing the coordinating process for the frequencies to be used, without a specific Commission authorization; and that TeleSTAR acted in good faith because it did not start construction until after the completion of frequency coordination.

10. The Bureau argues that the ALJ failed to make adequate demeanor findings in support of his candor conclusions. It asserts that the Commission should review the record and make its owns findings. The Bureau asserts that the record supports a conclusion that "somewhere along the way the principals adopted the mistaken impression that no preconstruction permit was required . . . [and that] it is highly plausible that the principals truly believed that no preconstruction approval was required." Bureau's February 24, 1987 Comments at 4-5. The Bureau also argues that TeleSTAR's principals are "forthcoming, credible witnesses." Comments on Petition for Reconsideration at 5. It urges the Commission to grant TeleSTAR's applications and impose a substantial forfeiture.

I. *Burden of Proof*

11. Before reaching the merits of TeleSTAR's contentions, we must first address its objections concerning the allocation of the burden of proof. The remand order said that both the burden of proceeding with the introduction of evidence and the burden of proof were on TeleSTAR. TeleSTAR argues that, when designated issues are predicated on allegations in a petition to deny, as they were in this case, the burdens of proof and proceeding are generally placed on the parties raising the allegations. *D and E Broadcasting*, 1 FCC 2d 78 (1965). It asserts that allocating the burden of proof to TeleSTAR is unfair because it would require TeleSTAR to "negative all possibilities of misconduct." *Lamar Life Insurance, Co.*, 5 FCC 2d 37, 40 (1966). TeleSTAR contends that we misread the hearing designation order, because it allocated the burden of proof to TeleSTAR only with respect to the conclusory issues. *TeleSTAR Inc.*, 50 Fed Reg. 27055 (July 1, 1985).

12. Although *D and E* held that the burden of proof is generally placed on "the party making the charges," it recognized "that there may be cases in which departure from this general practice may be justified." 1 FCC 2d at 80. In such cases, the Commission must explain its reasons for assigning the burden of proof to an applicant. *Id.* In the hearing designation order, the Bureau appended the following footnote to the ordering clause, requiring TeleSTAR to adduce evidence on all issues and assigning the burden of proof on the conclusory issues to TeleSTAR:

> Where an applicant, against whom charges of misconduct have been raised, has within its peculiar knowledge the facts regarding the alleged misconduct, the applicant will have the burdens of production and proof on such issues. *See generally*, Granbury Communications Co., 68 F.C.C. 2d 966, 969 (1978); Miami Broadcasting Corp., 11 F.C.C. 2d 920, 923 (Rev. Bd. 1968).

50 Fed. Reg. at 20758 n.19. For reasons explained below, this footnote provided the required explanation for putting the burdens of proceeding and proof on TeleSTAR as to the issues for which the facts are peculiarly within its knowledge.

13. In this proceeding, the factual issues concern whether TeleSTAR's premature "construction was effectuated with the knowledge that the construction was in violation of Section 21.3" and whether TeleSTAR "intentially misrepresented material facts to the Commission." 50 Fed. Reg. at 20758 ¶ 16. The operative facts with respect to these issues are peculiarly within the knowledge of TeleSTAR's principals. Thus, TeleSTAR properly bears both the burden of proceeding and the burden of proof with respect to those issues.

14. *Lamar Life*, cited by TeleSTAR, does not require a contrary result. In *Lamar Life* the alleged misconduct involved "acts of omission" and the issue did "not concern matters that are peculiarly within the knowledge of the applicant and unknown or inaccessible to the complaints." 5 FCC 2d at 39 ¶ 7. Although *Lamar Life* recognized that it would be unfair "[t]o require an applicant to negative all possibilities of misconduct of a generalized sort," such is not the case here. The issues here concern affirmative acts -- TeleSTAR's premature construction and its repre-

sentations to the Commission. TeleSTAR's defense is that its principals were proceeding in good faith. The remand order directed the ALJ to conduct further hearings to elicit evidence in order to clarify the differing and inconsistent arguments in TeleSTAR's pleadings concerning the premature construction; explain how its principals developed their erroneous understandings of the Commission's rules; and to supplement their testimony concerning their knowledge of the construction permit requirement. 2 FCC Rcd at 7354-56 ¶¶ 14-26. Clearly, because the nature of these matters concerns facts within the peculiar knowledge of TeleSTAR's principals, it is not unfair or unreasonable to require TeleSTAR to present evidence concerning the activities of its principals or to carry the burden of proving that its principals were proceeding in good faith.

15. TeleSTAR argues that footnote 19 of the hearing designation order is not binding because it conflicts with the ordering clause; and that the *Granbury Communications* and *Miami Broadcasting* proceedings, cited in the footnote, do not support allocating both the burden of proceeding and the burden of proof to the applicant. However, TeleSTAR's argument based on case law does not change the fundamental fact that the Communications Act itself, 47 U.S.C. § 309(e), provides "that with respect to any issue presented by a petition to deny or a petition to enlarge issues, such burdens [of proceeding and of proof] shall be as determined by the Commission." The ordering clause specifically assigns the burden of proceeding on the factual issues and the burden of proof on the conclusory issues to TeleSTAR. 50 Fed. Reg. at 20758 ¶ 17. Paragraph 17, however, is silent as to the burden of proof on the factual issues. That matter is addressed in footnote 19. Thus, nothing in footnote 19 is inconsistent with the remainder of the designation order. Moreover, in both the *Granbury Communications* and *Miami Broadcasting* proceedings the burdens of proof on factual issues were allocated to the applicants. *Granbury Communications*, 68 FCC 2d at 969; *Miami Broadcasting*, 11 FCC 2d at 293. Thus, those proceedings fully support the allocation of the burden of proof with respect to the factual issues to TeleSTAR.

2. ***Representations Relating to TeleSTAR's Premature Construction***

16. *Representations in TeleSTAR's Applications* : TeleSTAR began constructing its facilities in September 1984. In December 1984, TeleSTAR's outside counsel for communications matters sent TeleSTAR copies of Part 21 of the rules, putting TeleSTAR on constructive if not actual notice of the prohibition against premature construction. TeleSTAR Ex. 14. On January 4, 1985, TeleSTAR's president, Noel Stewart, certified TeleSTAR's applications, attesting that he had reviewed the applications and that they were true and complete to the best of his knowledge. The applications falsely represented that "TeleSTAR proposes to construct" its facilities. Nothing in the applications even intimated that TeleSTAR had already started construction. TeleSTAR's principals did not object to the representation concerning its intent to construct, nor did they advise their FCC counsel that TeleSTAR had already started construction. Tr. at 442-44, 681. Noel Stewart testified that the application was prepared by outside counsel for communications matters, that he had not seen all of the exhibits when he signed the applications, and that he did not know if he "had even seen this particular part" of the application. Tr. at 442-43. TeleSTAR's counsel was not aware of the construction until after the applications were filed. TeleSTAR Ex. 3.

17. Noel Stewart also certified that TeleSTAR had a copy of Part 21 and that he was "familiar with all rules affecting the proposed operation." Application Q. 33. However, TeleSTAR later disavowed the statements in the applications, asserting that Noel Stewart did not have an adequate opportunity to read the rules. TeleSTAR Motion for Summary Decision at 2 (filed Sept. 30, 1985). Noel Stewart later testified that he "had a short time to review the Rules" and that he could "not recall reading" section 21.3 or any other information indicating that there is a prohibition against construction without a permit. TeleSTAR Ex. at 12; Tr. at 338.

18. *Conflicting Arguments and Representations in TeleSTAR's Pleadings* : TeleSTAR advanced one explanation for its premature construction and then it abandoned that explanation for a conflicting explanation when it became apparent that its initial contentions were inconsistent with the facts. Thus, on March 21, 1985, TeleSTAR filed an Opposition to Petition to Dismiss its Applications, arguing that section 21.3 "is very amenable to misinterpretation" and that it understood section 21.3 of the rules to prohibit only the "installation and connection of hertzian wave propagation equipment." TeleSTAR Ex. 1, Attachment K at 30-31. The Board found that TeleSTAR's explanation was not credible because its construction in fact included antennas and waveguides, which are "hertzian wave propagation equipment." 2 FCC Rcd at 6 ¶ 7.

19. TeleSTAR abandoned the argument made in its March 21 Opposition in the subsequent Motion for Summary Decision filed September 20, 1985. TeleSTAR attributed the previous argument -- that it misunderstood the Commission's rules -- to its outside counsel for communications matters. Counsel testified that he drafted the pleading without ever attempting to determine if the Stewarts had read the rules Tr. at 849-50. TeleSTAR argued in the September 20 motion, for the first time, that Noel Stewart was not "aware of or had ever seen" section 21.3 before it started construction. Motion for Summary Decision at 2. Noel Stewart certified that the March 21 opposition was prepared under his supervision and that the facts contained in the opposition were true. TeleSTAR Ex. 1, Attachment K at 85. Noel Stewart explained the change, asserting that the opposition was prepared by TeleSTAR's communications counsel, that Stewart did not read it until after it was served, and that after reading the opposition "nothing bothered" him. Tr. at 346. It is clear, however, that the representations concerning Noel Stewart's knowledge of the rules -- in the application and the March 21 opposition, and in the September 20 motion -- are patently inconsistent, and that at least one of the documents contained representations which are false.

20. TeleSTAR erroneously argues that the remand order accepted TeleSTAR's contention that its principals did not become aware of the prohibition against premature construction during the course of their review of Part 21 before the certification of TeleSTAR's applications. The remand order merely recited the showing "that TeleSTAR's certification practices were sloppy and ill-advised" and concluded that those particular matters "standing alone do not warrant denial of its applications." 2 FCC Rcd at 7354 ¶ 13. That conclusion, however, does not alter the fact that TeleSTAR submitted patently false

information in either its pleadings or its applications, and that the false statements were the direct result of Noel Stewart's deficient certification practices. Noel Stewart's carelessness raises questions about the Commission's ability to rely on TeleSTAR's representations in the future and, when considered in the light of the full record in this proceeding, it must be considered as part of the evidence reflecting adversely on TeleSTAR's qualifications to be a licensee. We reiterate that our remand order gave TeleSTAR the opportunity to submit additional, mitigating evidence; but TeleSTAR chose not to do so.

21. *Documents Drafted by TeleSTAR's Principals* : Noel Stewart and his brother, Doyal Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR could begin construction after the completion of the frequency coordination process even if TeleSTAR had not yet received a written authorization from the Commission. Tr. at 327-29, 528-31. However, this testimony is inconsistent with statements contained in documents drafted by the Stewarts and distributed to TeleSTAR's shareholders.

22. TeleSTAR issued a Private Placement Memorandum (PPM) dated January 16, 1984 to explain its proposed operations to prospective investors. Doyal Stewart drafted the section of the PPM relating to site construction, which states that: "Construction of the sites will begin upon a preclearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after frequencies have been out on 'user notification.'" Tr. at 518-20; TeleSTAR Ex. 1, Attachment E at 31. Doyal Stewart also drafted a flow chart as part of the PPM which indicated that TeleSTAR would get "FCC Pre-Build Orders" before constructing facilities. Tr. at 518-20; TeleSTAR Ex. 1, Attachment E at 64. Although the PPM used different terminology than the Commission's rules, it conveyed a clear message that Commission authorization was required before TeleSTAR could start building its facilities.

23. TeleSTAR's awareness of a need for a construction permit was also shown by other contemporaneous documents. On April 17, 1984, Noel Stewart wrote to TeleSTAR's shareholders that the Commission's processes had been changed and that "the FCC now requires only that a *Construction Permit* (CP) be obtained and that an application have been filed for frequency licenses." TeleSTAR Ex. 1, Attachment G at 3 (emphasis added). In a letter dated June 7, 1984, Noel Stewart discussed the chronological sequence of the steps to be taken by TeleSTAR. He wrote that:

> The events ahead are: (1) Prior coordination (User Notification), (2) construction acquisitions and preparations, (3) site acquisition and formal leases on privately owned sites, (4) implementation of Phase II construction (low cost items and pre- fabrications), (5) finalization of User Notification coordination, (6) public notification, (7) *FCC granting of CP and final constructions*.

TeleSTAR Ex. 1, Attachment H at 7 (emphasis added). The letter continued:

> Some preliminary constructions of towers and other items will soon be underway. After the 30-day User Coordination is over--anticipated time-frame is mid July--some private sites will be obtained and the construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase.

Id. Although this letter recognized the need for a construction permit, it advised investors that TeleSTAR intended to start construction *before* obtaining FCC permits.

24. In a letter dated July 14, 1984, TeleSTAR advised its shareholders that the frequency coordination process was nearing completion and that it was hoping to complete substantial construction before receiving a permit. It advised investors that:

> After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an additional 30-day public notice by the FCC.
>
> Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2 - 3 remaining sites to be completed during September after receiving the FCC CP.

TeleSTAR Ex. 1, Attachment I at 4.

25. The PPM and letters to TeleSTAR's shareholders contradict TeleSTAR's representations discussed in paragraphs 18 and 19, above, and they establish that TeleSTAR knew that it needed a construction permit. The letters showed that TeleSTAR intended to construct its facilities before it received a permit from the Commission. TeleSTAR argues that this admission establishes its good faith because it would not have knowingly admitted its intention to construct facilities in violation of section 21.3. TeleSTAR has provided no basis for determining a motive for these statements. The remand order specifically advised TeleSTAR that we could not exonerate it on the basis of these statements without further information. 2 FCC Rcd at 7355 ¶ 19. TeleSTAR did not present such evidence on remand.

26. Moreover, TeleSTAR amended the PPM, at the insistence of prospective investors, to include an agreement for the dissolution and liquidation of the company if it was unable to commence operations by January 1, 1985. FCC 86D-30 at ¶ 14. The ALJ found that TeleSTAR started construction without a permit in order to meet its commitment to start operations by January 1, 1985. FCC 86D-30 at ¶ 25. Although we do not conclude that TeleSTAR's statements in the letters to its shareholders were motivated by its desire to placate anxious investors, the record, standing alone, does not warrant an inference of good faith predicated on TeleSTAR's statements in those letters. Because TeleSTAR has not otherwise explained its references to the need for a construction permit in the PPM and letters and because those documents show that it was aware of the construction permit requirement, these matters also establish that TeleSTAR is not qualified to be a Commission licensee.

27. *The Stewarts' Erroneous Understanding of the Commission's CP Requirement* : The burden of proof is on TeleSTAR to establish its qualifications. In light of the

significant evidence reflected in TeleSTAR's documents referring to "pre- build orders" and construction permits, TeleSTAR had to present persuasive evidence establishing a genuine good faith belief that it could construct without a permit. Noel Stewart testified: "Based on information available to us and our impressions, I believed . . . that FCC approval was necessary before radio equipment was installed or operated, but that it was not necessary before site construction began." TeleSTAR Ex. 1 at 5. Both Stewarts testified that after discussions with equipment suppliers and industry representatives they came away with the impression that they did not need a construction permit before starting construction. TeleSTAR Ex. 1 at 5-7; Tr. at 524. However, TeleSTAR presented no disinterested witness to corroborate this testimony. Moreover, they admitted that they did not consult with outside communications counsel about when they could start construction. Tr. at 526. Noel Stewart also admitted that no one ever told him that he did not need a construction permit to start construction of TeleSTAR's system. Tr. at 465-66.

28. The remand order found that TeleSTAR had failed to establish how the Stewarts developed their erroneous interpretation of the rules. 2 FCC Rcd at 7355 ¶ 21. We said that, without further evidence to show that the erroneous interpretation in fact resulted from a confusion about the rules, we could not find TeleSTAR qualified to be a license. *Id.* at 7355 ¶ 23. The remand order specifically afforded TeleSTAR's principals an opportunity to testify about the specific nature of their conversations with industry representatives and to present those representatives as witnesses. *Id.* at 7355 ¶¶ 20-23. In this regard, we find it hard to believe that the Stewarts would have solicited investments, made representations and expended funds based on "impressions," without first checking to ensure that those representations were accurate. TeleSTAR, nonetheless, has declined to present such pertinent evidence.

29. In any event, the limited evidence that TeleSTAR did present as to its industry contacts establishes, if anything, that the Stewarts were not misled by industry contacts. In an affidavit submitted by TeleSTAR, Edsel Davis of Spectrum Planning, Inc. stated: "I know that I would not have said construction without an FCC permit was permissible." Motion for Summary Decision, Ex. 7; Tr. at 545-46.

30. Similarly, we are unable to make any exculpatory inferences from the testimony of J. Craig Carmen, TeleSTAR's local corporate attorney, who investigated whether TeleSTAR's principals had prior knowledge of the rules. Carmen concluded that: (1) the Stewarts were aware of the need for a construction permit when they drafted the PPM; (2) after subsequently meeting with representatives of Spectrum Planning, they believed that TeleSTAR could start construction after receiving a "Preliminary Clearance Notification" (PCN); and (3) TeleSTAR did not start construction until it received clearance from Compucon, Inc. TeleSTAR Ex. 1, Attachment V. Carmen referred to statements by Noel Stewart that he believed a "preclearance construction order" was required when TeleSTAR issued the PPM, but that discussions with consulting contractors from Spectrum Planning and Compucon caused Noel Stewart to believe that TeleSTAR could start preliminary construction without a Commission authorization. Tr. at 273-77. Carmen testified, however, that Stewart could not point to any specific conversation where industry representatives told him that the construction was permitted, and that representatives of Spectrum Planning and Compucon had told Carmen that they would not have advised TeleSTAR that it could begin construction without a construction permit. Tr. at 263-65, 276, 288. The record does not include any other specific evidence concerning the nature of the conversations which these representatives had with the Stewarts. In view of the limited evidence in the record, we can give no credence to the Stewarts' self-serving and otherwise unsupported testimony that they gained their erroneous understandings of the rules from their contacts with industry representatives.

31. Doyal Stewart's specific explanation of why he thought construction was permissible further strains credulity. He testified that he *"never* thought that they [the FCC] would be concerned with the actual construction permit that . . . [he] would be getting from the city and county wherever we were building." Tr. at 533 (emphasis added). This statement is inconsistent with the portion of the PPM written by Doyal Stewart that clearly said that a "pre-build order" from the Commission was a prerequisite for construction. The above testimony, when compared with the precise language of the PPM prepared by Doyal Stewart, is a further indication of TeleSTAR's lack of candor in its representation to the Commission.

32. *Representations Concerning When TeleSTAR Discovered That Its Construction Violated the Rules:* TeleSTAR maintains that it did not know that its pre-construction was prohibited until it was told by David Irwin, its counsel for FCC matters, and that it ordered the construction stopped after consulting with Irwin. TeleSTAR Ex. 1 at 14. It is undisputed that work on the construction was completely shut down by January 25, 1985. TeleSTAR Exs. 16, 17, 18. What is disputed is whether the conversation with Irwin occurred before or after this date. TeleSTAR's witnesses claimed that on January 23, 1985, Steve Amundsen (TeleSTAR's director of marketing) was advised by a representative from Compucon that WTCI was inquiring about the premature construction. Amundsen testified that he immediately called Irwin, who told him that TeleSTAR should stop construction; that he discussed the Irwin call with the Stewarts; and that TeleSTAR ordered construction stopped. TeleSTAR Ex. 1 at 13-14; TeleSTAR Ex. 2 at 6; Tr. at 331, 596-98. Irwin, however, testified that he did not learn about the premature construction until January 29 -- that is, four days *after* TeleSTAR had stopped construction. Tr. at 694.

33. TeleSTAR argues that its principals' testimony is corroborated by telephone and billing records. TeleSTAR Exs. 2, 9. These records indicate that on January 23 and 29 the following calls -- by TeleSTAR to Compucon or Irwin & Lesse or Carmen, or by Compucon or Irwin & Lesse to TeleSTAR -- were made at the following (Mountain Daylight) times:

January 23

Time	Duration	
8:18 a.m.	3 min.	to Compucon
11:48 a.m.	10.9 min.	from Compucon
12:53 p.m.	6.1 min.	from Compucon
1:16 p.m.	7 min.	to Irwin & Lesse
1:34 p.m.	4 min.	to Irwin & Lesse
1:55 p.m.	4 min.	to Compucon
2:53 p.m.	6 min.	to Craig Carman

January 29

Time	Duration	
7:55 a.m.	4 min.	from Irwin & Lesse
8:16 a.m.	2 min.	to Irwin & Lesse

8:32 a.m.	14 min.	to Compucon
8:47 a.m.	1 min.	to Compucon
8:50 a.m.	4 min.	from Irwin & Lesse

TeleSTAR Ex 9. TeleSTAR also asserts that Bureau counsel found that its principals testified truthfully about the date on which they first became aware of the prohibition against premature construction.

34. This evidence is inconclusive and therefore not exculpatory. The telephone records show only that calls were made on both days. Those records would be consistent with a finding that Irwin had told Amundsen that the construction was prohibited on either day. Irwin testified that he could not have been notified about the construction on January 23, because the call from Amundsen was overheard by Frank Inserra (an associate) and because he also immediately discussed the call with Sylvia Lesse (his partner), and neither Inserra nor Lesse was in the office on January 23. Tr. at 694, 716-17, 900-01.

35. Based on the evidence in the record, we affirm the findings of the ALJ that TeleSTAR's principals lacked candor by testifying that they were unaware of the prohibition against premature construction until notified on January 23 by Irwin. The telephone records cited by TeleSTAR are, as noted above, inconclusive. Even the Bureau, which urges the Commission to accept the Stewarts' testimony, recognized that the telephone records are inadequate to determine when TeleSTAR discussed the premature construction with Irwin. Bureau's Proposed Findings filed December 20, 1985, at 14 ¶ 37. TeleSTAR spent more time on phone calls on January 23 than on January 29. On January 23, however, TeleSTAR filed its applications, and this could explain the difference.

36. We note, further, that the testimony of TeleSTAR's principals is also in conflict with a predesignation pleading filed by TeleSTAR. In a Response to Request for Rejection of Applications, filed February 11, 1985 (TeleSTAR Ex. 1, Attachment S), TeleSTAR represented that Amundsen did not become aware of the inquiries about the premature construction until January 24 and that he did not call Irwin until January 29 -- the same date that Irwin testified he received the call.

37. We also find that Irwin's testimony is simply more credible on the issue of when the call was made. Whereas TeleSTAR's telephone records do not indicate the subject matter discussed, Irwin's contemporaneous billing slip indicates that on January 29 he had discussions *concerning the premature construction*. TeleSTAR Ex. 12. The billing slip for January 23 includes no similar notation. More importantly, Irwin presented clear explanation of why he believed the call was made on January 29 instead of January 23. In contrast, Amundsen's direct testimony initially placed the call on January 24 (TeleSTAR Ex. 2 at 6) and his explanation of why he changed his testimony to January 23 is unconvincing. Although Amundsen testified that he consulted telephone logs, he did not explain why those logs convinced him that January 23 was correct, nor did he otherwise provide any corroboration for his changed testimony. Tr. at 596- 97. Similarly, Noel Stewart's direct testimony placed the telephone conversation during which Irwin advised TeleSTAR to stop construction "around the last of January"; moreover, he did not adequately document or explain why he subsequently changed his testimony to claim that the critical Irwin call was made on January 23. TeleSTAR Ex. 1 at 13; Tr. at 329-32.

38. TeleSTAR also had reason to be less than candid about the date when Irwin told TeleSTAR that construction without a permit was improper. TeleSTAR argued throughout this proceeding that it had been unaware of the construction permit requirement. However, it is undisputed that construction on TeleSTAR's proposed facilities was halted by January 25. Given this fact, it was imperative for TeleSTAR to claim that the premature construction conversation with Irwin occurred on January 23. Otherwise, an inference could be drawn that the construction was halted as soon as inquiries were made because TeleSTAR's principals already knew that the construction was improper and that it could not be justified.

39. The remand order found a lack of evidence explaining how or why TeleSTAR's principals concluded that the discussions concerning premature construction occurred on January 23. We remanded this proceeding to adduce further evidence concerning when Irwin advised TeleSTAR that the construction was prohibited. 2 FCC Rcd at 7356 ¶ 26. As previously discussed, the telephone records do not support the testimony of TeleSTAR's principals, and TeleSTAR has failed to supplement its initial showing. Thus, the available record evidence establishes that TeleSTAR's principals lacked candor in their testimony concerning when they became aware of the prohibition against premature construction.

40. *The Bureau's Pleadings* : The Common Carrier Bureau argues that the Stewarts and Amundsen were "forthcoming, credible witnesses." Comments filed January 12, 1988, at 12. It accepted their testimony that Irwin told them on January 23 that the construction was prohibited. The Bureau argues that TeleSTAR would not have stopped the work on its facilities without being advised to do so by Irwin. Proposed Findings, filed December 20, 1985 at 14 ¶ 38.

41. On January 23, 1985, TeleSTAR became aware of WTCI's inquiries about its premature construction. It is plausible that TeleSTAR stopped construction in response to these inquiries. The Bureau admitted that it was "at a loss" to explain the credible testimony of Irwin, Lessee and Inserra that Irwin told TeleSTAR that premature construction was prohibited on January 29. *Id.* The testimony of Irwin, Lessee and Inserra is also supported by TeleSTAR pleadings and contemporaneous billing slips. On the other hand, the claim that TeleSTAR's principals were unaware of the construction permit requirement is inconsistent with the PPM and the letters to TeleSTAR's shareholders. In view of the gaps in the record, the contrary evidence, and the failure of TeleSTAR to present explanatory, exculpatory evidence, we cannot find that TeleSTAR's witnesses were candid in their testimony.

42. *TeleSTAR's Premature Construction* : The parties have stipulated and the record supports the finding that TeleSTAR constructed facilities without a construction permit in violation of 47 C.F.R. § 21.3.

43. *The ALJ's Demeanor Findings* : The remand order found that the ALJ's credibility conclusions were not supported by specific demeanor finding. 2 FCC Rcd at 7353 ¶ 11. An ALJ's credibility rulings "should be supported by some specification in order to be accorded significant weight." *Gulf Coast Communication, Inc.*, 81 FCC 2d 499, 506 (Rev. Bd. 1980), recon. denied, FCC 82-128 (Apr. 16, 1982). Where an ALJ fails to provide a detailed demeanor analysis, we can make our own findings based on the record evidence. *Id.*, 81 FCC 2d at 506. We have not

relied on the ALJ's demeanor findings in this proceeding. In order to ensure that the record fully supports the denial of TeleSTAR's applications, we have reviewed the testimony and exhibits and made our own determinations on the specified issues.

44. *The Dismissal of TeleSTAR's Applications* : The remand order afforded TeleSTAR a further opportunity to establish its qualifications to be a license. The order listed specific deficiencies in TeleSTAR's showing, where further information -- if submitted -- could help establish TeleSTAR's qualifications. The ALJ was directed to conduct further hearings to elicit evidence concerning those record deficiencies. TeleSTAR's argument that the record is complete is without merit. For example, the Stewarts testified that they developed a misunderstanding of the Commission's rules after conversations with industry representatives. TeleSTAR, however, never described those conversations and it failed to present the industry representatives as witnesses to bolster the Stewarts' self serving, unsupported testimony. Its explanations concerning the drafting of documents and of when it allegedly became aware of section 21.3 are also unconvincing. TeleSTAR's refusal to exchange witness lists or exhibits and its decision to rest on the existing record fully justified the ALJ's dismissal of its applications for a failure to prosecute and stands as a separate and distinct basis for the denial of its applications. At a minimum, TeleSTAR could have called as witnesses its industry contacts and it could have presented its principals as witnesses so that they could be further examined on the matters raised in the remand order. We will therefore deny TeleSTAR's appeal and affirm the ALJ's dismissal of its applications.

3. ***Conclusions Regarding TeleSTAR's Basic Qualifications***

45. The only substantial evidence supporting TeleSTAR's version of the facts is the unsupported, self-serving, and at times self-contradictory testimony of its principals. Although TeleSTAR had the burden of establishing its qualifications, it did not present documentary or other supporting evidence that would corroborate or otherwise demonstrate the credibility of its witnesses.

46. In remanding this proceeding, we listed specific gaps and inconsistencies in the record, and we stated why we were unable to find TeleSTAR qualified to be a licensee. TeleSTAR declined to provide additional evidence for the record. In view of the conflicts between the testimony of TeleSTAR's witnesses and the other evidence, we find that the record fully supports the findings of the ALJ and the Board that the preponderance of the circumstantial, documentary and other evidence establishes that TeleSTAR has misrepresented material facts and exhibited a lack of candor in its prosecution of these applications. Consequently, we cannot conclude that TeleSTAR is basically qualified to be a licensee and that the grant of its applications would serve the public interest.

47. If this were merely a case of premature construction, a lesser penalty such as a monetary forfeiture might be appropriate. For example, in *Eagle Telecommunications, Inc.*, 59 RR 2d 1243 (1985), recon. denied, 59 RR 2d 1249 (1986), we imposed a forfeiture of $20,000 for the unauthorized construction and operation of cable television facilities by a telephone carrier. However, in addition to the violations of section 21.3, there are TeleSTAR's misrepresentations and lack of candor, and its failure to prosecute its applications in the remanded proceeding.

48. In *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1211 (1986), we stated that it is "necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." The policies relevant to an applicant's character in the broadcast context differ from those in the common carrier context. *Id.* at 1202 n.52. But those differences are not pertinent here because the character issues raised involve TeleSTAR's relationship to the Commission and the integrity of the Commission's processes, not TeleSTAR's status as a common carrier. Lack of candor and misrepresentation are sufficient grounds for the adverse action here. *Password, Inc.*, 76 FCC 2d 465, 519 ¶ 121 (1980), recon. denied, 86 FCC 2d 437, 441 ¶ 10 (1981); *Superior Communications Co.*, 57 FCC 2d 772, 776 ¶ 19 (1976).

49. As set out above, we have closely examined the record in this proceeding. Based on that record, it is clear that TeleSTAR violated the rules by its premature construction. TeleSTAR also submitted patently false information as a result of Noel Stewart's deficient certification practices. It also made misrepresentations of material facts and exhibited a lack of candor: (1) in its applications which falsely represented that TeleSTAR proposed to construct its facilities, (2) in its pleadings filed March 21 and September 20, 1985, which contained inconsistent and contradictory explanations for its premature construction, and (3) in its principals' self-serving testimony concerning their understanding and knowledge of the Commission's construction permit requirement, which was unsubstantiated and rebutted by the other record evidence. The record therefore requires us to conclude that TeleSTAR is not qualified to be a licensee. We further find that TeleSTAR failed to prosecute its applications in the remanded proceeding, that its applications were properly dismissed by the ALJ, and that its failure to prosecute is a separate and independent ground for the denial of its applications for new microwave radio stations.

III. ORDERS

50. ACCORDINGLY, IT IS ORDERED, that the Petition for Leave to File Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. IS GRANTED.

51. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

52. IT IS FURTHER ORDERED, That the Application for Review filed February 9, 1987 by TeleSTAR, Inc. IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

53. IT IS FURTHER ORDERED, That the Urgent Request for Expedited Action, filed April 14, 1988 by TeleSTAR, Inc. IS DISMISSED.

54. IT IS FURTHER ORDERED, That the Appeal filed April 22, 1988 by TeleSTAR, Inc., IS DENIED.[1]

55. IT IS FURTHER ORDERED, That the applications for authority to construct new Common Carrier point-to-point microwave radio stations filed by TeleSTAR, Inc. (File Nos. 1743 CF-P-85 through 1757 CF-P-85) ARE DENIED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] Also before the Commission are Comments filed by the Common Carrier Bureau and an Opposition filed by Western Tele-Communications Inc. on May 9, 1988. These pleading were not considered in our determination to deny TeleSTAR's appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-92

In re Applications of

WILLIAM L. ZAWILA File No. BP-851126AF
Templeton, California

For Construction Permit

Appearances

Russel C. Powell on behalf of William L. Zawila

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: May 11, 1988; Released: May 19, 1988

INTRODUCTION

1. One applicant remains, William L. Zawila (Zawila). He filed a Motion for Summary Decision on May 6, 1988. There he wants designated Issues 1 and 2 resolved in his favor, and his application granted. *See* 53 F.R. 10425 published March 31, 1988, Issues 1 and 2.

2. Zawila's motion will be granted; the two issues will be resolved in his favor; and his application will be granted.

FINDINGS OF FACT

3. When the Chief, Audio Services Division designated this case for hearing, he specified a 47 CFR 73.24(g) blanketing issue, and a site availability issue against Zawila.

4. On April 29, 1988, Zawila petitioned for leave to amend his application and he supplemented that petition on May 6, 1988. There he submitted data that addressed both the basic qualifying issues that he faces. His petition was granted, and his amendments accepted. *See* FCC 88M-1404, released May 12, 1988.

5. That data has been analyzed. It permits a favorable consideration of Zawila's summary decision request. His amended application won't cause "blanketing," won't violate 47 CFR 73.24(g). He has also shown that his specified transmitter will be available for the use he proposes. So no genuine issues of fact remains. The truth is clear. Zawila is qualified to construct and operate as proposed.

CONCLUSIONS OF LAW

6. With the "blanketing" and the site availability issues resolved in his favor, and with no other basic qualifying issues outstanding against him, Zawila's application can be granted. He is qualified to construct and operate as proposed. *See* 53 F.R. 10425 *supra.*, at para. 7.

SO the Motion for Summary Decision that William L. Zawila filed on May 6, 1988, IS GRANTED; Issues 1 and 2 at 53 F.R. 10425 ARE RESOLVED in his favor; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on their own motion, William Zawila's application (File No. BP-851126AF) IS GRANTED;[1] and

This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTE

[1] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters
for FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

ERRATUM

Released: May 20, 1988

1. On April 29, 1988, the Commission released the full text of a *Memorandum Opinion and Order (MO&O)* in the captioned matter (FCC 88-152). In the *MO&O,* the Commission granted reconsideration of its action in the *Second Report and Order* (*Second Report)* (FCC 87-296) with regard to the minimum power requirement for Class A FM stations, and amended Section 73.211 of the rules accordingly. On December 4, 1987, prior to the *MO&O,* but subsequent to the *Second Report* and the related reconsideration requests, the Mass Media Bureau issued under delegated authority an *Order* (*Order)* (DA 87-1691) in the matter of Oversight of the Radio and TV Broadcast Rules, which also amended Section 73.211 of the rules. Specifically, the *Order* added two new paragraphs (a)(1) and (a)(2) and redesignated the remaining paragraphs.

2. Because the petitions and the *MO & O* addressing them were prepared without consideration of the new paragraph designations, some confusion may arise as to which paragraphs are referenced in these documents. Also, further review of the action taken in the *Order* with regard to Section 73.211 reveals that the new paragraphs added, (a)(1) and (a)(2), essentially duplicate language that already exists in Section 73.210. Thus, the amendments made to Section 73.211 by the *Order* were unnecessary. It appears that the simplest way to correct the situation is to reorganize and republish the entire Section 73.211. Accordingly, the attached APPENDIX replaces the appendix associated with the full-text release of the *MO&O.*

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III.
Acting Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.211 is revised in its entirety to read as follows:

§ 73. 211 Power and antenna height requirements.

(a) *Minimum requirements.* (1) Except as provided in paragraphs (a)(3) and (b)(2) of this section, the minimum effective radiated power (ERP) for:

Class A stations must equal 0.1 kW (-10.0 dBk);

Class B1 stations must exceed 3 kW (4.8 dBk);

Class B stations must exceed 25 kW (14.0 dBk);

Class C2 stations must exceed 3 kW (4.8 dBk);

Class C1 stations must exceed 50 kW (17.0 dBk);

Class C stations must equal 100 kW (20.0 dBk).

(2) Class C stations must have an antenna height above average terrain (HAAT) of at least 300 meters (984 feet). No minimum HAAT is specified for Classes A, B1, B, C2, or C1 stations.

(3) Stations of any class except Class A may have an ERP less than that specified in paragraph (a)(1) of this section, provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, exceeds the distance to the class contour for the next lower class. Class A stations may have an ERP less than 100 watts provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, equals or exceeds 6 kilometers.

(b) *Maximum limits.* (1) The maximum ERP in any direction, reference HAAT, and distance to the class contour for the various classes of stations are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft)	Class contour distance in kilometers
A	3kW (4.8 dBk)	100 (328)	24
B1	25kW (14.0 dBk)	100 (328)	39
B	50kW (17.0 dBk)	150 (492)	52
C2	50kW (17.0 dBk)	150 (492)	52
C1	100kW (20.0 dBk)	299 (981)	72
C	100kW (20.0 dBk)	600 (1968)	92

(i) The reference distance of a station is obtained by finding the predicted distance to the 1 mV/m contour using Figure 1 of §73.333 and then rounding to the nearest kilometer. Antenna HAAT is determined using the procedure in §73.313. If the HAAT so

determined is less than 30 meters (100 feet), a HAAT of 30 meters must be used when finding the predicted distance to the 1 mV/m contour.

(ii) If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 3 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 24 km in both cases.

(iii) Except as provided in paragraph (b)(3) of this section, no station will be authorized in Zone I or I-A with an ERP equal to 50 kW and a HAAT exceeding 150 meters. No station will be authorized in Zone II with an ERP equal to 100 kW and a HAAT exceeding 600 meters.

(2) If a station has an antenna HAAT greater than the reference HAAT for its class, its ERP must be lower than the class maximum such that the reference distance does not exceed the class contour distance. If the antenna HAAT is so great that the station's ERP must be lower than the minimum ERP for its class (specified in paragraphs (a)(1) and (a)(3) of this section), that lower ERP will become the minimum for that station.

(3) In Puerto Rico and the Virgin Islands:

(i) Class B stations may use antenna heights up to 600 meters (1968 feet) above average terrain with effective radiated powers up to 25.5 kW. For antenna heights above 600 meters (1968 feet), the power must be reduced so that the station's 1 mV/m contour (located pursuant to Figure 1 of §73.333) will extend no farther from the station's transmitter than with the facilities of 25.5 kW and an antenna height of 600 meters (1968 feet). For powers above 25.5 kW (up to 50 kW) no antenna height will be authorized which results in greater coverage by the 1 mV/m contour (located pursuant to Figure 1 of §73.333) than that obtained with the facilities of 25.5 kW ERP and an antenna height of 600 meters (1968 feet).

(ii) Class A stations may use antenna heights up to 335 meters (1100 feet) above average terrain with effective radiated powers up to 3 kW. For antenna heights above 335 meters (1100 feet), the power must be reduced so that the station's 1 mV/m contour (located pursuant to Figure 1 of §73.333) will extend no farther from the stations transmitter than with the facilities of 3 kW ERP and an antenna height of 335 meters (1100 feet).

(iii) Class B1 stations may use antenna heights up to 335 meters (1100 feet) above average terrain with effective radiated powers up to 5 kW. For antenna heights above 335 meters (1100 feet), the power must be reduced so that the station's 1 mV/m contour (located pursuant to Figure 1 of §73.333) will extend no farther from the station's transmitter than with the facilities of 5 kW and an antenna height of 335 meters (1100 feet). For powers above 5 kW (up to 25.0 kW) no antenna height will be authorized which results in greater coverage by the 1 mV/m contour than that obtained with the facilities of 5 kW ERP and an antenna height of 335 meters (1100 feet).

(c) *Existing stations*. Stations authorized prior to March 1, 1984 that do not conform to the requirements of this section may continue to operate as authorized. Stations operating with facilities in excess of those specified in paragraph (b) of this section may not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond the location permitted by their present authorizations. The provisions of this section will not apply to applications to increase facilities for those stations operating with less than the minimum power specified in paragraph (a) of this section.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENERAL COMSERV CORPORATION — File No. I-T-C-87-176

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 11, 1988; Released: May 20, 1988

By the Chief, Common Carrier Bureau:

1. On September 8, 1987, General Comserv Corporation (Comserv) filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice services between the U.S. and various overseas points. The application was placed on public notice on September 23, 1987.

2. Petitions to Deny the Application were filed by Call U.S., Inc. (Call U.S.) and Caribbean American Long Lines Services (CALLS) on October 23, 1987. Comserv filed a Combined Opposition to the Petitions to Deny on November 5, 1987. CALL US and CALLS filed Replies to the Opposition on November 13, 1987. The Petitions to Deny the application allege that Comserv provided international resale service prior to being authorized by the Commission and request that Comserv be ordered to cease and desist from its unauthorized international resale operations and that the captioned application be denied.

3. In its Opposition, Comserv alleges anticompetitive tactics on the part of the Petitioners and that the alleged unauthorized operations are the subject of an informal complaint presently before the Commission. Comserv concludes that no allegations have been forthcoming that require the denial, dismissal or delay of Comserv's application. The Petitioners in their Reply reiterate their allegations and request for relief and deny that their petitions were filed because of anti-competitive reasons.

4. On August 17, 1987, CAll U.S. filed an informal complaint (IC-87-5574) with the Commission alleging that Comserv was reselling international long distance telephone service without appropriate authorization from this Commission and without a proper tariff being on file. Comserv was served with a copy of the complaint and responded. Call U.S. also filed supplemental information. Upon review of the record, the Common Carrier Bureau's Enforcement Division (Enforcement Division) found that Comserv had indeed violated Section 214 of the Communications Act of 1934, as amended, and Parts 63 and 61 of the Rules by providing international resale of telephone service without appropriate authority from this Commission and without an appropriate tariff being on file with this Commission. While failure to follow Commission's rules of this type have warranted more severe sanctions in the past in other situations, the Enforcement Division concluded that if Comserv immediately ceased all international service for any purpose and submitted an affidavit stating that: (1) it would not provide international service without appropriate authority or a proper tariff being on file; (2) it cancelled all charges billed to customers for international services; (3) it refunded any charges collected for those services; and (4) it paid $3,000 to the United States Treasury pursuant to Section 503(b) of the Act in lieu of issuing a forfeiture pursuant to a Notice of Apparent Liability, the Enforcement Division would consider this matter closed.[1] Comserv met the conditions set forth[2] and the Enforcement Division closed the matter on that basis. [3] We believe the sanctions imposed in the resolution of the informal complaint regarding Comserv's violations of the Act and the Rules satisfactorily fulfill our statutory obligations under the Act. We perceive no need to further penalize the applicant by either delay, dismissal, or denial of its application. We do not believe such additional measures are necessary to gain future compliance of our rules by this party. However, Comserv is advised that its violation of the Act and Rules is part of its record and will be considered in the event of future violations.

5. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. Comserv, a Puerto Rico corporation, is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[4] We find that the market will support additional carriers and that the added competition will be in the public interest.[5]

6. For the foregoing reasons, IT IS CERTIFIED, that the present and future convenience and necessity require the provision of international switched voice services to the general public by Comserv.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-87-176 IS GRANTED and Comserv is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, and AT&T Puerto Rico's Tariff FCC No. 13, between the U.S., Puerto Rico and the U.S. Virgin Islands, and those points listed in those tariffs.

8. Copies of any operating agreements entered into between Comserv and its correspondents shall be filed with the Commission within 30 days of their execution.

9. The Petitions to Deny filed by CALL U.S. and CALLS are hereby DENIED.

10. IT IS FURTHER ORDERED that Comserv shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order and shall not provide international services pursuant to that tariff prior to its effective date.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for

review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Letter from Chief, Enforcement Division, Common Carrier Bureau, to J. Steven Huffines (December 3, 1987).

[2] *See* Letter from Gary G. Fischer, Comserv to Chief, Enforcement Division, Common Carrier Bureau (December 30, 1987).

[3] *See* Letter from Chief, Enforcement Division, Common Carrier Bureau, to J. Steven Huffines (January 28, 1988).

[4] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548 (released April 4, 1986) at n. 2.

[5] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-138

In the Matter of

Inquiry Into the Availability
Broadcast Television Signals on
Cable Television Systems

ERRATUM

Released: May 20, 1988

1. On May 10, 1988, the Commission released a Notice of Inquiry (FCC 88-129) regarding the television signal carriage practices of cable systems. In that Notice of Inquiry, paragraph number seven, item five, is in error. Part of the first sentence of item number six was omitted and, as a result, the remaining portion of item number six appears as part of item number five. The corrected items numbered five and six of paragraph number seven read as follows:

> 5. For stations that commenced operation after *Quincy* and would have been entitled to carriage on cable systems under the former must carry rules, the same information specified in 1, 2, and 3 above for dropped signals or signals never carried.
>
> 6. The number of cable systems that have *added* individual signals that would have been required to be carried, the types of signals added, the number of subscribers, the number of usable channels, the percentage of the broadcast signals' potential audience that are subscribers to the system, and the number and type (commercial or noncommercial, UHF or VHF, network affiliated or independent) of other broadcast signals on the system.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT EARTH STATIONS, INC. File No. I-T-C-88-059

Application to Discontinue its Operation of the Yap (KA-36), Truk (KA-37), Pohnpei (KA-38), and Kosrae (KA-39) International Earth Stations in the Federated States of Micronesia and the Majuro (KA-40) and Ebeye (KA-41) International Earth Stations in the Republic of the Marshall Islands

ORDER AND CERTIFICATE

Adopted: May 11, 1988; Released: May 20, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 18, 1987, Comsat Earth Stations, Inc. (CES), subsidiary of the Communications Satellite Corporation (Comsat), filed an application, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to conclude its provision of multi-purpose earth station services. The application, involving a number of earth stations, is unopposed. For purposes of this order, we are segregating out of the December 18, 1987 application that portion of the filing that relates to the CES discontinuance of operations at six international earth stations located in the Federated States of Micronesia and the Republic of the Marshall Islands.[1] CES' application to discontinue its operation of these six facilities contemplates that the appropriate telecommunications entities of the Federated States of Micronesia and the Republic of the Marshall Islands will purchase and continue operation of the earth stations. For the reasons stated below, we authorize CES to discontinue its operations in favor of the sovereign entities in which the facilities are located, consistent with the Compact of Free Association between the United States and each of these governments.

II. BACKGROUND

2. On July 18, 1947, the government of the United States began its administration of the United Nations Trust Territory of the Pacific Islands (TTPI), which at that time included the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands and Palau.[2] The United Nations Trusteeship Agreement, [3] which established the TTPI and placed it under U.S. administration, entrusted the United States with broad economic and political oversight and "protectorate" functions. Article 6 of the Trusteeship Agreement provides that the United States shall promote the development of the peoples of the TTPI toward self-government or independence as appropriate to the particular circumstances of the TTPI and its peoples and the freely expressed wishes of the peoples concerned. Article 6 also provides that the U.S. protectorate obligations under the Trusteeship Agreement extend to the installation and maintenance of communications systems in the TTPI.[4]

3. In 1975, after extensive status negotiations, the people of the Northern Mariana Islands, through the Marianas Political Status Commission, and the government of the United States concluded a Covenant to establish a Commonwealth of the Northern Mariana Islands in political union with the United States,[5] and in 1976 the Commonwealth of the Northern Mariana Islands was administratively separated from the balance of the TTPI. During the period 1978-1980, each of the remaining political subdivisions of the TTPI -- the Federated States of Micronesia, the Marshall Islands, and Palau -- adopted a separate constitution, and became known, respectively, as the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. The Secretary of the Interior, who by executive order is responsible for the civil administration of the TTPI, *see supra* n. 2, in 1979 provided for increased self-government within these three constitutional governments of the TTPI.[6] Although the Secretarial Order generally delegated, *inter alia*, the executive functions of the TTPI to the three constitutional governments, it retained within the office of the High Commissioner of the TTPI the authority and responsibility for the operation and maintenance of telecommunications systems within the TTPI.[7]

4. The High Commissioner exercised this authority during 1981 by entering, with each of the three constitutional governments, into agreements with Comsat for the construction and operation of multi-purpose earth stations within the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau. The Commonwealth of the Northern Mariana Islands, through its authorized common carrier, Micronesian Telecommunications Corporation, also entered into an agreement with Comsat, for the construction and operation of an earth station at Saipan. Comsat then filed applications with the Commission to construct and operate eight international multi-purpose earth stations to be located within the four components of the TTPI.[8] In granting Comsat's applications to construct and operate these facilities, we stated that the economic growth and viability of each of the four political entities depended in part on the adequacy of high quality overseas communications. With respect to the three constitutional governments of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, we also recognized the U.S. protectorate obligation under the Trusteeship Agreement to install and maintain communications systems for the TTPI.

5. Our decisions to grant Comsat's applications for the seven earth stations to be located within the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau further recognized that the Commission's limited jurisdiction over communications services within the TTPI was predicated on the territorial status of the TTPI within the meaning of the Communications Act and the Communications Satellite Act.[9] We noted that the pending status negotiations between the United States and each of the three political entities were

looking toward a greater degree of independence for the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau, and we concluded that this greater degree of independence could divest us of our jurisdiction over the earth station services. We therefore expressly reserved the right to require Comsat, as a rate base carrier, to sell its interests in the seven earth stations should the future political status of any of the three TTPI components divest the Commission of its jurisdiction.

6. Two of these three TTPI entities subsequently have achieved a greater degree of independence.[10] On November 3, 1986, President Ronald Reagan determined that the Trusteeship Agreement is no longer in effect, with respect to the Republic of the Marshall Islands, as of October 21, 1986, and, with respect to the Federated States of Micronesia, as of November 3, 1986. The President concurrently placed into full force and effect the Compact of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands.[11] The Federated States of Micronesia and the Republic of the Marshall Islands are now sovereign, self-governing states in free association with the United States.

7. Although, pursuant to the Compact, the governments of the Federated States of Micronesia and the Republic of the Marshall Islands are competent and capable to conduct foreign affairs in their own name and right with respect to, *inter alia*, communications, they have requested the government of the United States to act as their agent with regard to certain communications services set forth in Section 131 of the Compact. Section 131, entitled "communications," states that the Federated States of Micronesia and the Republic of the Marshall Islands have full authority and responsibility to regulate their respective domestic and foreign communications, and that the government of the United States shall provide communications assistance, in accordance with the terms of a separate agreement. Section 131 states that the separate agreement shall provide for the following communications assistance: first, for United States government notification to the International Frequency Registration Board of the International Telecommunications Union and, second, that:

> the United States Federal Communications Commission has jurisdiction, pursuant to the Communications Act of 1934, 47 U.S.C. 151 et seq., and the Communications Satellite Act of 1962, 47 U.S.C. 721 et seq., over all domestic and foreign communications services furnished by means of satellite earth terminal stations where such stations are owned or operated by United States common carriers and are located in the Marshall Islands or the Federated States of Micronesia.

Section 131 further provides that the separate communications assistance agreement shall come into effect simultaneously with the Compact and remain in effect with respect to either government until that government elects to undertake the communications functions set forth in the agreement.[12] The separate communications assistance agreement, also executed on October 1, 1982 and June 25, 1983 by the United States and, respectively, the Federated States of Micronesia and the Republic of the Marshall Islands, remains in effect to date because neither sovereign government has elected to undertake the communications functions currently performed by the United States government.

8. The intent of Section 131 of the Compact is to extend to the Commission limited jurisdiction to license and otherwise regulate earth station services furnished by means of earth stations owned or operated by U.S. common carriers and located within the Federated States of Micronesia and the Republic of the Marshall Islands, subsequent to the effective dates of the Compact. The communications services currently furnished by CES, a United States common carrier, through the six earth stations it owns and operates within the now-sovereign states of the Republic of the Marshall Islands and the Federated States of Micronesia, fall within the jurisdiction extended to the Commission by the terms of Section 131 of the Compact.[13] To discontinue provision of these services in favor of the sovereign entities in which the facilities are located, CES must obtain from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected.[14] Once the Commission has so certified, and CES has implemented the sale of the facilities, the Commission will not exercise jurisdiction over the licensing of the six international earth stations owned and operated by the sovereign states in which they are located.[15]

III. APPLICATION

9. The CES application to discontinue its operation of the six international multi-purpose earth stations in the Republic of the Marshall Islands and the Federated States of Micronesia contemplates that the government of the Republic of the Marshall Islands and the Federated States of Micronesia Telecommunications Corporation will purchase the CES earth stations located in the respective states.[16] The CES agreements of sale with the two governments recognize the governments' right, pursuant to the 1981 agreements between the governments and Comsat calling for construction of the earth stations, to purchase the facilities on the effective dates of the Compact of Free Association. The sales agreements also stipulate that, because of the chEarth *Station Modification Order*,[17] CES, as current owner and operator of the earth stations, might find itself unable to continue to apply its existing averaged worldwide earth station rates after December 31, 1987.[18] The respective sales agreements further provide that the two earth stations in the Republic of the Marshall Islands will be purchased for $550,000 and the four earth stations in the Federated States of Micronesia, for $1,900,000. The CES application states that CES will surrender its radio station licenses for these stations upon grant of its Section 214 discontinuance application and implementation of the sale of the facilities.

IV. DISCUSSION

10. Comsat has made a business decision to divest itself of its multi-purpose earth station interests,[19] both those it holds through the Earth Station Ownership Committee (ESOC)[20] and those in its wholly-owned earth stations in the Pacific Ocean Region.[21] CES' instant application, to discontinue operations through the six wholly-owned international earth stations located in the Federated States of Micronesia and the Republic of the Marshall Islands, is

predicated both on Comsat's response to the changes in earth station ownership policy adopted in the Commission's *Earth Station Modification Order* [22] and on the provisions in its 1981 agreements with the two governments to construct and operate the earth stations, which provided the governments the right to purchase the facilities on the effective dates of the Compact of Free Association. Under the terms of the Compact, the two governments are now sovereign, self-governing states with full authority and responsibility to regulate their respective domestic and foreign communications. They, or their telecommunications entities, propose to purchase and continue operation of the international earth stations located within their sovereign states.[23] Considering the above-described developments and the absence of opposition to the immediate application, we find that the grant of authority to CES to discontinue its operations at the six international earth stations in favor of the sovereign entities in which the facilities are located will serve the public interest, convenience and necessity. Once the sale of the facilities is implemented, the Commission will not exercise licensing jurisdiction over the earth stations owned and operated by the sovereign states in which they are located.[24]

11. Upon consideration of the application, IT IS CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance by Comsat Earth Stations, Inc. of its use and operation of the six international multi-purpose earth stations at Yap, Truk, Pohnpei and Kosrae in the Federated States of Micronesia and at Majuro and Ebeye in the Republic of the Marshall Islands.

12. Accordingly, IT IS ORDERED that the component of the CES application, File No. I-T-C-88-059, seeking to discontinue the CES earth station operations at Yap, Truk, Pohnpei, Kosrae, Majuro and Ebeye, IS GRANTED and CES is authorized to discontinue its operation of these facilities in favor of the sovereign entities in which the facilities are located, consistent with the Compact of Free Association between the government of the United States and the government of the Federated States of Micronesia and the government of the Republic of the Marshall Islands.[25]

13. IT IS FURTHER ORDERED that CES SHALL SURRENDER to the Commission its Title III licenses for these six international earth stations upon implementation of the sale of the facilities.

14. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Our decision today is the second Commission action taken on the CES application. On March 18, 1988, the Acting Chief, International Facilities Division, pursuant to delegated authority, granted that portion of the CES application seeking to discontinue the operation of the Paumalu, Hawaii international earth station. *See* Comsat Earth Stations, Inc., File No. I-T-C-88-059, DA 88-407 (released March 29, 1988).

[2] *See* Joint Res. July 18, 1947, c. 271, 48 U.S.C.A. Section 1681 note (1987), 61 Stat. 397. As then constituted, the TTPI covered some three million square miles of the western Pacific Ocean just above the Equator, ranging from about one degree to twenty-two degrees north latitude and one hundred thirty degrees to one hundred seventy-two degrees east longitude. It embraced more than 2,000 islands and islets in three major archipelagoes: the Carolines, the Marshalls and the Marianas. However, Guam, also located in the Marianas, has never been a part of the TTPI. In 1962, the Secretary of Interior, who by executive order is responsible for the civil administration of the TTPI, *see* Executive Order No. 11021, 48 U.S.C.A. Section 1681 note (1987), vested in a High Commissioner of the TTPI the executive authority of the TTPI. *See* Secretarial Order No. 2918 (as amended March 24, 1976), *reprinted in* 1986 Trust Territory of the Pacific Islands, 39th Annual Report to the United Nations (U.S. Department of State, 1986) at 279 (39th Annual Report).

[3] Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, 61 Stat. 3301, T.I.A.S. No. 1665 (1947) *reprinted in* Bevans, Treaties and Other International Agreements of the United States of America 1776-1949, v. 12, at 953.

[4] *See id. See also* P.L. 96-597 Section 401, 48 U.S.C.A. Section 1681 note (1987), 94 Stat. 3477.

[5] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C.A. Section 1681 note (1987). The executive authority for the Northern Mariana Islands became vested in the Governor of the Northern Mariana Islands as of January 9, 1978, the date the Constitution of the Northern Mariana Islands entered into full force and effect. *See* Presidential Proclamation No. 4534 (October 24, 1977), 48 U.S.C.A. Section 1681 note (1987).

[6] *See* Secretarial Order No. 3039 (April 25, 1979), as amended, *reprinted in* 39th Annual Report at 301-305. This order generally delegated to the three constitutional governments, on the effective dates of their respective constitutions, *inter alia*, the executive functions of the TTPI.

[7] *See* Secretarial Order No. 3039 at Section 3.a.7.

[8] *See* Communications Satellite Corporation, File No. 484-C-S-G-P-80, Mimeo No. 32379 (released June 10, 1980)(authorizing station at Susupe, Saipan, Commonwealth of Northern Mariana Islands); Communications Satellite Corporation, File No. C-S-G-81-001-P, Mimeo No. 002096 (released July 10, 1981), *modified* Order on Reconsideration, Mimeo No. 624 (released November 20, 1981) (authorizing station at Koror, Palau); Communications Satellite Corporation, File Nos. C-S-G-82-005-P *et al.*, Mimeo No. 3147 (released April 2, 1982)(authorizing stations at Yap, Truk, Pohnpei and Kosrae, Federated States of Micronesia and at Majuro and Ebeye, Republic of Marshall Islands). In September 1985 the Chief, International Facilities Division approved the assignment of the licenses for these stations from Comsat to its subsidiary, CICI. *See, e.g.*, File No. C-S-G-85-041-AL. Subsequently, in an order released November 16, 1987, we approved CICI's application for consent to assign the authorizations for certain multi-purpose earth sta-

tions, including those before us in this order, to Comsat's newly formed subsidiary, CES. Communications Satellite Corporation, 2 FCC Rcd 7202 (1987).

[9] Our decision with respect to the Commonwealth of the Northern Mariana Islands noted that the laws of general applicability to the states, including the Communications Act of 1934, as amended, extended to the Commonwealth of the Northern Mariana Islands.

[10] The third TTPI government, the Republic of Palau, has concluded a Compact of Free Association with the United States. However, in the Republic of Palau, the Compact approval process has not yet been completed. Until the future political status of the Republic of Palau is resolved, the United States will continue to discharge its responsibilities in the Republic of Palau as administering authority under the Trusteeship Agreement. *See* Presidential Proclamation 5564, 48 U.S.C.A. Section 1681 note (1987).

[11] *See* Presidential Proclamation No. 5564, 48 U.S.C.A. Section 1681 note (1987). The Compact came into effect after: 1) mutual agreement between the government of the United States, as administering authority under the United Nations Trusteeship Agreement, and the respective TTPI government; 2) approval of the Compact by the United States and the respective TTPI government, in accordance with constitutional processes; and 3) the conduct of a plebiscite in each of the respective jurisdictions. On October 1, 1982 and June 25, 1983, the United States and, respectively, the Federated States of Micronesia and the Republic of the Marshall Islands reached mutual agreement and signed a Compact of Free Association. The government of the Federated States of Micronesia approved the Compact in accordance with its constitutional processes and in a United Nations-observed plebiscite on June 21, 1983. The government of the Republic of the Marshall Islands approved the Compact in accordance with its constitutional processes and in a United Nations-observed plebiscite on September 7, 1983. The United States Congress, by joint resolution, approved the Compact in the Compact of Free Association Act of 1985, 48 U.S.C.A. Section 1681 note (1987). Section 101(a) of this Act authorized the President of the United States to agree to an effective date for the Compact. In his November 3, 1986 proclamation declaring the Compact to be in full force and effect, the President also determined that the Trusteeship Agreement is no longer in effect, with respect to the Commonwealth of the Northern Mariana Islands, as of November 3, 1986, and placed into full force and effect the Covenant with the Commonwealth of the Northern Mariana Islands. Many sections of the Covenant had entered into force and effect in 1976 and 1978. On November 4, 1986, the remaining sections of the Convenant entered into force and the domiciliaries of the Northern Mariana Islands became citizens of the United States. *See* Presidential Proclamation 5564, 48 U.S.C.A. Section 1681 note (1987).

[12] Compact of Free Association, Section 131, as approved by the U.S. Congress in the Compact of Free Association Act of 1985, *see* 48 U.S.C.A. Section 1681 note (1987), and placed into full force and effect by the President of the United States in Presidential Proclamation No. 5564, *see id.*

[13] Commission jurisdiction over these earth stations extends to ratemaking and operational aspects. *See* H.R. Rep. No. 188(I), 99th Cong., 1st Sess. 17 (1985), *reprinted in* 1985 U.S. Code Cong. and Ad. News 2762.

[14] Section 214 of the Communications Act, 47 U.S.C. Section 214. It must also surrender its licenses for these stations because neither of the sovereign entities would be eligible, under Section 310 of the Communications Act, as amended, 47 U.S.C. Section 310, to hold a radio station license for any of the earth stations.

[15] The Commission continues to exercise jurisdiction over the earth stations at Saipan, Commonwealth of the Northern Marianas and Koror, Republic of Palau. With respect to Palau, *see supra* n. 10. With respect to the Northern Marianas, *see supra* n. 9 and n. 11. In an order released March 18, 1988, the Acting Chief, International Facilities Division, pursuant to delegated authority, granted the application of Micronesian Telecommunications Corporation to acquire from CES and operate the Saipan earth station. *See* Micronesian Telecommunications Corporation, File No. I-T-C-88-043, DA 88-311 (released March 18, 1988).

[16] *See* Agreement of Sale Between CES and Government of the Republic of the Marshall Islands (February 19, 1988) and Agreement of Sale Between CES and Federated States of Micronesia TelecommunicationsCorporation (February 4, 1988).

[17] 100 F.C.C. 2d 250 (1984).

[18] This is the date on which AT&T consummated its purchase of the Etam, Roaring Creek and Jamesburg earth stations from the joint owners of the U.S. Mainland Consortium of the Earth Station Ownership Committee (ESOC). *See* March 14, 1988 letter from Shant Harootunian, Attorney, AT&T to Secretary, F.C.C. The instant CES application advises that the decision of the joint owners of the U.S. Mainland Consortium of ESOC to transfer their interests in the Etam, Roaring Creek and Jamesburg earth stations to AT&T affected the ability to cost-average among high and low volume earth stations and to apply a uniform global rate for multi-purpose earth station services.

[19] *See* Communications Satellite Corporation, 2 FCC Rcd 7202, 7206 n. 2.

[20] Through the various consortia of the ESOC, Comsat and participating U.S. international service carriers have provided for the joint ownership and operation of international multi-purpose earth stations located on the U.S. mainland and at certain offshore points, as required by the Commission's 1966 decision in its earth station ownership proceeding, Second Report and Order, 5 F.C.C. 2d 812 (1966).

[21] *See* , *e. g.*, Micronesian Telecommunications Corporation, DA 88-311 (released March 18, 1988)(approving transfer of wholly-owned station at Saipan, Commonwealth of Northern Marianas from CES to MTC).

[22] 100 F.C.C. 2d 250 (1984). This decision modified the Commission's joint ownership requirement, *see supra* n. 20, by adopting a policy permitting carriers other than Comsat and the ESOC composed of Comsat and U.S. international service carriers to own and operate international multi-purpose earth stations. The Commission concluded that a more liberal earth station ownership policy would benefit users by increasing carrier and service benefits and creating competitive pressures on rates. In the transition to a new competitive earth station ownership policy, it permitted the ESOC owners to negotiate among themselves the future of the ESOC and then submit an agreement for Commission consideration. The ESOC owners recently have submitted to the Commission a series of applications seeking to implement the dissolution of the various consortia of the ESOC. A number of these filings have been granted to date. *See* American Telephone and Telegraph Co., 2 FCC Rcd 6635 (1987)(approving AT&T's acquisition of Etam, Roaring Creek and Jamesburg facilities); MCI Communications Corp., 3 FCC Rcd 6 (1987)(granting MCI's acquisition of Andover earth station); Comsat International Communications, Inc., 2 FCC Rcd 1167 (1987)(allowing discontinuance of Brewster Flat facility); Comsat Earth Stations, Inc., DA 88-407 (released March 29, 1988)(allowing discontinuance of Paumalu facility and dissolution of Hawaii Consortium of the ESOC).

[23] *See , e. g.*, March 2, 1988 letter from The Honorable John R. Haglelgam, President of the Federated States of Micronesia, to Chairman Dennis R. Patrick, F.C.C., stating that the government of the Federated States of Micronesia intends to ensure that the Yap, Truk, Pohnpei and Kosrae earth stations continue to provide reliable and high quality communications at reasonable prices. *See also* February 26, 1988 letter from The Honorable Wilfred I. Kendall, Representative, Republic of the Marshall Islands, to Chairman Patrick.

[24] U.S. carriers that provide service between the U.S. mainland, Alaska or offshore points and the now sovereign states of the Republic of the Marshall Islands and the Federated States of Micronesia fall under the Commission's international competitive carrier policies, International Competitive Carrier Policies, Report and Order, 102 F.C.C. 2d 812 (1985) *recon. denied* FCC 86-339 (released August 7, 1986), and, *inter alia*, Sections 43.51, 43.53 and 43.61 of the Commission's Rules, requiring U.S. common carriers to file with the Commission, respectively, their contracts and concessions, reports on their division of toll charges, and reports of overseas telecommunications traffic.

[25] In our review of the instant application, we noted that Comsat had depreciated the value of these earth stations to points at or near zero. According to information provided by Comsat in response to our specific request, in 1988 Comsat restored the net book values to the sales price through adjustments to the depreciation reserves. Comsat made adjustments totalling approximately $2.8 million for the earth stations at Yap, Truk, Pohnpei, Kosrae, Majuro, Ebeye, and Palau. These adjustments should be reflected as reductions to the appropriate 1988 depreciation expense accounts and should be noted in the appropriate Form M and Form 901 reports and tariff filings specifically cross-referenced to this order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

MODESTO File No. 21805-CL-P-142-A-86
CELLTELCO

For Authority to Construct and
Operate a Domestic Public Cellular
Radio Telecommunications System on
Frequency Block A in the Modesto,
California Metropolitan Statistical
Area

ORDER ON RECONSIDERATION

Adopted: May 11, 1988; Released: May 20, 1988

By the Chief, Common Carrier Bureau:

1. William D. McBroom (McBroom) has filed a petition seeking reconsideration of the action taken by the Mobile Services Division (MSD) granting the above-captioned application. CellTelCo has filed an Opposition. For the reasons set forth below, we conclude that the action of the MSD was proper, and thus we deny the petition.

BACKGROUND AND CONTENTIONS

2. On February 27, 1986, Celutel, Inc. (Celutel) filed its application for authority to operate a nonwireline cellular system in the Modesto, California Metropolitan Statistical Area. Celutel subsequently joined the Modesto CellTelCo partial settlement group. Celutel's application was chosen first in the Modesto nonwireline Lottery on May 5, 1986, and the settlement group (CellTelCo), in which Celutel had a 50.01% interest, became Celutel's successor-in-interest. McBroom timely filed a petition to deny CellTelCo's application, averring that CellTelCo failed to disclose the interests and holdings of certain individuals and entities having a 5% interest or greater in its application, and CellTelCo's relationships with other companies involved in the cellular industry. McBroom also raised technical and financial issues. The MSD denied McBroom's Petition to Deny. 2 FCC Rcd 4775 (1987).

3. In its Petition for Reconsideration (Petition), McBroom asserts that Celutel certified in its application that it owned 11.4% of Cellular, Inc. (CI) as of February 21, 1986. McBroom further alleges that subsequent to that date, Celutel filed its Form 10-K with the Securities and Exchange Commission (SEC), in which it stated that "a total of 57 [cellular] markets [would] come under CI's Control." McBroom argues that Celutel's interests in those 57 wireline markets should have been disclosed to the Commission under Section 22.13 of the Commission's Rules because, by its calculations, Celutel owned in excess of 5% of each of the entities said to own the licenses for those markets.[1] McBroom argues alternatively that Celutel knowingly made material misrepresentations in its SEC filings when referring to the 57 markets since it had previously stated in its Reply to McBroom's Petition to Deny that CI had only one actual interest in a cellular system in markets 1-120, and eleven interests in markets below 120. Third, McBroom urges that Celutel misrepresented its relationship with the independent telephone companies (ITCs) by stating in the application that it had no interest in and was not affiliated with any entity engaged in providing landline telephone service, while CellTelCo had stated in its Reply that CI participated in the filing of wireline cellular applications through subsidiaries which were controlled by one or more independent telephone companies.

4. CellTelCo states in its Opposition that all of McBroom's allegations have been rendered moot by the fact that Celutel no longer has a stock ownership interest in CI.[2] CellTelCo also states that Celutel's application nonetheless made all disclosures required under Section 22.13 regarding CI. Specifically, CellTelCo maintains that no disclosures beyond Celutel's ownership interest in CI, and that CI was the licensee of a Public Land Mobile Service facility and a minority owner of the Colorado Springs wireline cellular licensee, were required pursuant to Section 22.13 at the time it certified its application. CellTelCo states that it subsequently disclosed by amendments to the Modesto application that Celutel also had interests in eleven additional wireline cellular applications through CI, none of which had been filed with the Commission prior to the certification of Celutel's Modesto application. CellTelCo states that the remainder of the 57 markets referenced by McBroom were in Rural Service Areas, for which applications have not yet been filed, and that Celutel was not required to disclose the contents of any agreements between CI and the ITC's. Additionally, CellTelCo states that it did not misrepresent its relationships with any landline telephone companies insofar as neither CI nor the subsidiaries through which it files cellular applications are themselves providers of landline telephone service. Finally, CellTelCo denies that Celutel made any misrepresentations to the SEC in its 10-K. CellTelCo asserts that McBroom was in possession of a copy of Celutel's 10-K at the time it filed its Petition to Deny and included that document as an exhibit thereto; that McBroom did not raise the allegation then; and that McBroom is therefore estopped from raising the issue in its Petition for Reconsideration since it is not based on any newly discovered facts.

DISCUSSION

5. Section 22.921 of the Commission's rules bars the ownership of interests in more than one applicant for the same market. [3] The purpose of the Rule 22.13(a) disclosure requirements is "to prevent an applicant from filing numerous applications in the same geographical area under different names", in contravention of Section 22.921. *Cellular One of Terre Haute, Inc.*, 2 FCC Rcd. 4752 (1987). *See also, Public Notice*, "Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service", 52 Rad. Reg. 2d (P&F) 1053, released November 26, 1982. Hence, for the purposes of Section 22.13(a), an applicant need not submit information concerning entities other than those with interests in Part 22 licensees in the same geographic area. *Cellular One of Terre Haute, supra.* Celutel disclosed in its Modesto application that it held an 11.47% interest in CI; that CI was the licensee of Public

Land Mobile Station KNKB 467 at Colorado Springs, Colorado; and that CI held a minority interest in Colorado Springs Cellular, which in turn held a minority interest in the Colorado Springs wireline licensee. CI subsequently acquired interests in eleven wireline applications, none of which had been filed as of the certification date of the original Celutel application. These interests were not listed in the Modesto application but were subsequently disclosed by amendments after McBroom filed its Petition to Deny. CI also acquired interests in two existing wireline systems after CellTelCo filed its Reply to the Petition to Deny, and CellTelco failed to amend its Modesto application to reflect these two later acquisitions. Nonetheless, the cellular interests at issue did not run afoul of the Commission's real party in interest requirements since they did not concern any interests in the Modesto market. Likewise, Celutel was under no obligation to disclose the agreements between CI and the wireline carriers concerning Rural Service Areas, since such applications have not yet been filed and thus are also not within the ambit of Section 22.13(a).

6. Nonetheless, Celutel did make a misstatement in the Modesto application regarding its relationships with the various independent telephone companies. Celutel stated in Exhibit 2 that "it is not directly or indirectly interested in or affiliated with any entity or person engaged in the business of providing a public landline message telephone service." In its Reply, however, CellTelCo stated that CI participates in the filing of wireline applications through minority interests in applicant corporations controlled by one or more independent telephone companies. Clearly CI's relationships with these landline telephone companies would constitute "affiliations" within the plain meaning of that word. However, CI, not Celutel, entered into the agreements to file cellular applications through a subsidiary in which the landline telephone companies hold a controlling interest. Celutel itself did not have any business relationships with the ITCs independent of CI (in which Celutel held only a minority interest). While it appears that Celutel and the ITCs were "affiliates" of each other within the plain meaning of that word, this connection is too tenuous to support a conclusion that Celutel intentionally misrepresented its relationships with the ITCs. Accordingly, we will not dismiss Celutel's application based on that ground alone. However, we caution CellTelCo that in the future, we will expect it to disclose such relationships with landline telephone companies in its applications before this Commission. Celutel should not have stated in its Modesto application that it was not in any way affiliated with a landline telephone company when that was not the case. Furthermore, CellTelCo's contention that McBroom's allegations are moot because Celutel no longer has a stock ownership interest in CI is not valid. Celutel's sale of its CI stock occurred after it filed the Modesto application, and therefore after the statements at issue were made. We are not concerned with the propriety of Celutel's affiliations with CI and the landline companies, but rather with the substance of Celutel's statements to this Commision regarding those interests. The fact that Celutel is no longer a shareholder of CI is therefore irrelevant.

7. Finally, with reference to Celutel's alleged misrepresentation to the SEC on its Form 10-K, we agree with McBroom that a misrepresentation before another public agency is cognizable in an FCC proceeding. *Kannapolis Television Co. Joint Venture*, 1 FCC Rcd. 1037 (1986). However, in *Kannapolis*, the petitioner was found by a federal bankruptcy court to have engaged in fraudulent conveyances, a finding which the Commission regarded as final. In the instant proceeding, there has been no final determination by the SEC or any other agency regarding Celutel's alleged misstatements on its Form 10-K, and thus we are not bound to accord any weight to what at this point is merely an allegation and a denial. We will not reverse the previous decision on this ground.

8. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by William D. McBroom is DENIED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Applications for Review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this Order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] McBroom derived the 5% figure as follows: Cellutel owns 11.4% of CI. CI stated that it entered into agreements with independent telephone companies operating within the market areas to form subsidiaries which would then own the respective applications. CI owned 49% of each of the subsidiaries. Therefore, McBroom argues, since 11.4% x 49% = 5.586%, Celutel thus owned in excess of 5% of each of the subsidiaries which in turn own the applications.

[2] Celutel sold 28,799 shares of its CI stock during January of 1987 and sold the remainder in July of 1987.

[3] Ownership interests of less than 1% are not considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COMEX, INC. File No. 23196-CD-P/L-1-86

To establish additional facilities for one-way Station KCI295 to operate on frequency 152.24 MHz in the Public Land Mobile Service at Nashua and Epsom, New Hampshire

RAM COMMUNICATIONS OF MASSACHUSETTS File No. 21859-CD-P/L-1-85

To establish an additional facility for one-way Station KSV956 to operate on frequency 152.24 MHz in the Public Land Mobile Service at Andover, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1988; Released: May 20, 1988

By the Chief, Common Carrier Bureau:

BACKGROUND

1. On November 26, 1985, the Federal Communications Commission held a lottery in the Public Mobile Service in which RAM Communications of Massachusetts, Inc. (RAM) was ranked first and Comex, Inc. (Comex) was ranked second. Comex was the only applicant with which RAM was mutually exclusive.[1] By letter dated December 4, 1985, Comex requested that the lottery results be set aside because Comex had filed a Petition for Comparative Hearing on October 30, 1985, which had not been resolved prior to including RAM and Comex in the lottery. On February 14, 1986, the Common Carrier Bureau ordered that the results of the lottery be set aside for the reason stated in Comex's October 30, 1985 letter and ordered that RAM's and Comex's applications be designated for a comparative hearing. *See* Memorandum *Opinion and Order Designating Applications for Hearing*, Mimeo No. 2623, released February 14, 1986 (*Designation Order*). In making this determination, the Common Carrier Bureau concluded that Comex had demonstrated that a) it proposed additional transmitter locations to a licensed authorized station on the same frequency within 40 miles of its existing transmitter locations on that frequency, and b) there was a sufficient demand by its existing subscribers for the expanded service.

2. However, on March 5, 1986, by *Memorandum Opinion and Order*, Mimeo No. 2966, the Common Carrier Bureau, pursuant to Section 1.113(a) of the Rules,[2] set aside the *Designation Order* upon concluding that the *Designation Order* had failed to dispose of a Petition to Deny filed by RAM and "various related pleadings which had been filed by the parties." [3] Those other pleadings included an Opposition to the Petition for Comparative Hearing (Opposition) filed by RAM, and a Reply to Opposition to Petition for Comparative Hearing (Reply) filed by Comex. In this Order, we will consider the arguments raised in those pleadings.

3. In its Opposition, RAM argues that because the Commission envisioned retaining comparative hearings only between an existing carrier and a new applicant vying for the same frequency, and not between two or more applicants seeking to expand their existing co-channel systems, such as RAM and Comex, a comparative hearing would not serve the public interest. Next, RAM argues that Comex had failed to demonstrate a demand from its existing subscribers for expanded service.

4. In its Reply, Comex argues that any existing carrier seeking to expand its system is entitled to a comparative hearing if it can meet the other provisions of Section 22.33(c)(i), requiring that it have an existing system within 40 miles and that it show there is an adequate demand from existing subscribers for expanded service, whether or not the other applicant is a new applicant or another applicant seeking expanded service. Comex argues that were the Commission to conclude otherwise, there would never be a need for a comparative hearing because the existing carrier would always be preferred. Comex also argues that it has demonstrated demand from its existing subscribers for expanded service.

5. We have reviewed the pleadings and have determined, based on all the arguments and relevant precedent, that Comex has not demonstrated that the public interest would be served by a comparative hearing.[4]

Discussion

6. In December 1984, the Commission adopted a procedure under which public land mobile service applicants may be eligible to receive a comparative hearing in lieu of a lottery. *Lottery Selection Among Applicants* (*Lottery Selection*), 57 Rad. Reg. 2d (P&F) 427, 436-37 (1984).[5] In addition to the requirements that the applicant demonstrate that it proposes to add one or more transmitter locations within 40 miles of an authorized transmitter operating on the same frequency and that there is a demand from its existing subscribers for the proposed expansion of service, the applicant must also demonstrate that "the public interest would be served by using some form of comparative procedure instead of a lottery." 47 C.F.R. Section 22.33(c). The Commission has noted only two circumstances in which an applicant could demonstrate that a comparative hearing was justified: a) the applicant proposes to increase the capacity of its authorized system by adding transmitters, or b) the applicant proposes to increase its geographic coverage by adding transmitter locations. The Commission further has specifically noted that with respect to these two circumstances:

> [Existing carriers] may be limited in their choice of frequencies by factors that do not constrain new station applicants. A new applicant may simply apply for a different available frequency in the event of losing a licensing lottery, while an existing carrier may be precluded from expanding its authorized system in an efficient manner if the only frequencies

compatible with its operations are awarded to another applicant by lottery, even though frequencies in other bands may be available.

Lottery Selection, 57 Rad. Reg. 2d (P&F) at 436-37. Thus, it is clear that the Commission decided to retain comparative hearings for the express purpose of permitting an existing carrier to demonstrate its extraordinary need for a particular frequency as against the need of a new applicant vying for the same frequency. *See also Southwestern Bell Telephone Company*, Mimeo No. 3258, released March 21, 1986.

7. Comex argues that if the Commission had intended to permit comparative hearings only between a new applicant and an existing carrier, there would be no need for comparative hearings at all because the existing carrier would always be preferred. However, this argument was considered and rejected by the Commission:

> In permitting the use of a comparative hearing instead of a lottery in these circumstances [outlined above], it is not our intention to establish an automatic presumption that an applicant seeking to expand an authorized system is to be preferred over a new applicant. Upon designation for hearing, all applicants will be given the opportunity to demonstrate that the public interest would be served by a grant of their applications.

Lottery Selection, 57 Rad. Reg. 2d (P&F) at 437 n 15.

8. Accordingly, we find that inasmuch as both Comex and RAM are existing carriers seeking to expand their operating co-channel systems, Comex has not made the required public interest showing. Because we find that Comex has not made this showing, we find it unnecessary to address the issue of whether Comex made an sufficient demonstration of demand from its existing subscribers for expanded service.

ORDERING PARAGRAPHS

9. IT IS ORDERED, That the Petition for Comparative Hearing filed by Comex IS DENIED.

10. IT IS FURTHER ORDERED, That the results of the lottery selection, 17-11, held November 26, 1984, are REINSTATED.

11. IT IS FURTHER ORDERED, That the application of RAM Communications of Massachusetts, Inc., File No. 21859-CD-P/L-1-85, IS GRANTED.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its release date. Applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock,
Chief, Common Carrier Bureau

FOOTNOTES

[1] See Public Notice, PMS 17-11, released November 29, 1985.

[2] Section 1.113(a) of the Rules states that, "Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."

[3] On February 24, 1986, RAM had filed a Petition to Certify Issues to the Commission noting that the Designation Order had failed to address RAM's pleadings.

[4] Because we find, after reviewing the Request for Comparative Hearing and the responsive pleadings, that a lottery, and not a comparative hearing was appropriate, we are reinstating the results of the November 26, 1985 lottery in which RAM was selected first and therefore, we need not dispose of the Petition to Deny that was filed by RAM.

[5] We note that lottery selection of a licensee among mutually exclusive applicants is the general rule. Section 22.33(c) merely provides an exception, which is strictly construed. Mobile Phone of Texas, Mimeo No. 2728, released February 22, 1985." United Telespectrum, 1 FCC Rcd. 305 (1986)(emphasis added). See also Speed Call, Inc. and C&W Communications, 2 FCC Rcd 21 (1987); American Paging, Inc. (of Connecticut), 2 FCC Rcd 4517 (1987); Kerrville Telephone Co., 2 FCC Rcd. 2288 (1987); and Aalert Paging Co. of San Diego, 2 FCC Rcd 2287 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-241

In re Applications of

LIVINGSTON COMMUNICATIONS, INC. (hereafter LCI)	File No. BPH-870701MR
WEST SIDE COMMUNICATIONS, INC. (hereafter WSCI)	File No. BPH-870701MX
M. Kip Holden d/b/a WKIP, LIMITED A PARTNERSHIP IN COMMENDAM (hereafter Holden)	File No. BPH - 870701NB

For Construction Permit for a New FM Station on Channel 242A (96.3 MHz) in Brusly, Louisiana

HEARING DESIGNATION ORDER

Adopted: May 4, 1988; **Released: May 20, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
WSCI	March 21, 1988

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(b), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: WSCI.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-243

In re Applications of

JOHN GARBER AND ASSOCIATES A GENERAL PARTNERSHIP (hereafter Garber) — File No. BPH-870514MD

TRELL BROADCASTING COMPANY (hereafter TBC) — File No. BPH-870514MG

ALSPACH/VARGA COMMUNICATIONS, INC. (hereafter AVCI) — File No. BPH-870515MH

PHILLIPS BROADCASTING, INC. (her eafter PBI) — File No. BPH-870515MJ

For Construction Permit
for a New FM Station on
Channel 278A (103.5 MHz)
Lancaster, Ohio

HEARING DESIGNATION ORDER

Adopted: May 4, 1988; Released: May 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *TBC*. In its application as originally filed on May 14, 1987, TBC certified that it was financially qualified. By amendment dated June 17, 1987, however, TBC indicated that it was not currently financially qualified, that it was in the process of obtaining the necessary financing, and that its initial response certifying that it was financially qualified was an inadvertent error. On June 29, 1987 and July 20, 1987, TBC amended its application. Among other changes, the June 29 amendment certified that TBC was still not financially qualified and the July 20 amendment certified that TBC was, once again, financially qualified.

3. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. 50 Fed. Reg. at 19941; *See also* 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules. 47 C.F.R. § 73.3522(a)(6).

4. TBC's 30-day period for filing amendments, as a matter of right, began May 26, 1987 and ended June 26, 1987. Therefore, the June 17, 1987 amendment, which indicated that TBC was not financially qualified, is the only one timely filed and the only one which may address the acceptability or grantability of TBC's application. The amendment filed on July 20, 1987, was filed after the expiration of the 30-day period. Additionally, TBC failed to make a showing of good cause for the acceptance of this untimely-filed amendment as required by the Commission's rules. Apparently, TBC filed this amendment as if it fell within the scope of 47 C.F.R. § 1.65. While 47 C.F.R. § 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications, this rule does not require the acceptance of such an amendment when, as in the instant case, it attempts to cure an acceptability or grantability defect in the underlying application and the period for filing curative amendments has already lapsed. *See, e.g., Donovan Burke*, 60 RR 2d 110, 112-13 (1986). Sections 1.65 and 73.3522 are complimentary and not conflicting rules, and we will not allow applicants, under the guise of a 47 C.F.R. § 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per 47 C.F.R. § 73.3522. Accordingly, based on the foregoing, the financial certification contained in TBC's July 20 amendment will not be accepted for filing under 47 C.F.R. § 1.65, and the amendment will be returned.

5. Section II, Item 4, FCC Form 301, asks applicants to list the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. TBC's application, as amended on June 29, 1987, lists three shareholders whose combined ownership interests total 50.1%. TBC omitted the names, addresses, percentages of stock held, and the other required information for the stockholder(s) holding the remaining 49.9% of the applicant. Accordingly, TBC will be required to file an amendment detailing the remaining ownership interests with the presiding Administrative Law Judge within 30 days of the release of this Order.

6. Douglas E. Triplett, a principal of TBC, is the program director at Radio Ohio, Inc., licensee of Stations WBNS-AM/FM, Columbus, Ohio. Mr. Triplett has indicated that, in the event a construction permit is issued to TBC in this proceeding, he will resign his position at these stations. Accordingly, an appropriate condition will be specified below.

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED

TBC	June 29, 1987
PBI	November 9, 1987

8. Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANT: Garber.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the following applicant whether, in light of the evidence adduced concerning the deficiency set forth above, the applicant is financially qualified: TBC.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Garber would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 2-4 hereinabove, the amendment of July 20, 1987 filed by TBC IS HEREBY RETURNED.

13. IT IS FURTHER ORDERED, That TBC shall submit the amendment indicated in paragraph 5 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in the event of a grant of TBC's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Douglas E. Triplett has resigned his position as program director at Radio Ohio, Inc., licensee of WBNS(AM)/(FM), Columbus, Ohio.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: TBC, AVCI.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988**, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-239

In re Applications of

MILFORD, LTD. File No. BPH-870515MR
(hereafter Milford)

JCH BROADCASTERS CORPORATION File No. BPH-870515NG
(hereafter JCH)

For Construction Permit for a
New FM Station in Milford, Delaware
on Channel 267A (101. 3MHz)

HEARING DESIGNATION ORDER

Adopted: May 3, 1988; Released: May 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *JCH.* In response to Section II, Item 6(a), FCC Form 301, the applicant states that principal Harry E. Jarman is currently employed by Great Scott Broadcasting (GSB) as Sales Manager. The applicant further states that Mr. Jarman will terminate his employment at GSB upon grant of the instant application. Although the applicant failed to indicate the FM stations owned by GSB, a review of Commission's records indicates that GSB owns three FM stations: WFEM(FM), Ellwood City, Pennsylvania; WSEA(FM), Georgetown, Delaware; and WCHR(FM), Trenton, New Jersey. Accordingly, an appropriate condition will be specified below.

3. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANT: Milford

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Milford would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

6. IT IS FURTHER ORDERED, That in the event of the grant of JCH's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Harry E. Jarman has terminated his employment at Great Scott Broadcasting.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-238

In re Applications of

WHITE EAGLE, LIMITED PARTNERSHIP (hereafter White Eagle)	File No. BPH-870429ME
JOHNSON DES MOINES BROADCASTING LIMITED (hereafter Johnson)	File No. BPH-870429ML
RONALD SORENSON (hereafter Sorenson)	File No. BPH-870430MM
CLEAR CHANNEL COMMUNICATIONS, INC. (hereafter Clear Channel)	File No. BPH-870430MO
MIDWEST RADIO, INC. (hereafter Midwest)	File No. BPH-870430MQ
DES MOINES BROADCAST LIMITED PARTNERSHIP (hereafter DMB)	File No. BPH-870430MS
SANTEE BROADCASTING, INC. (hereafter Santee)	File No. BPH-870430MV
JOSHUA ONE EIGHT, D/B/A HEART OF IOWA BROADCASTING (hereafter Heart)	File No. BPH-870430MW
SPACECOM, INC. (hereafter SpaceCom)	File No. BPH-870430MZ
CHUCKAY CORPORATION (hereafter Chuckay)	File No. BPH-870430NA
ASTERISK BROADCASTING, INC. (hereafter Asterisk)	File No. BPH-870430NB
SINCLAIR TELECABLE, INC. (hereafter Sinclair)	File No. BPH-870430NC
BEVERLY J. HEWITT, RUTH SIRKO, *ET AL.* D/B/A HIGH TOWER PARTNERSHIP (hereafter High Tower)	File No. BPH-870430ND
DES MOINES SKYWAVE, INC. (hereafter Skywave)	File No. BPH-870430OJ

For Construction Permit for a New FM station on Channel 298C2 (107.5 MHz) at Des Moines, Iowa

HEARING DESIGNATION ORDER

Adopted: May 3, 1988; Released: May 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Johnson.* On March 7, 1988, Midwest filed a petition to deny Johnson's application and requested dismissal of that application or, alternatively, an inquiry into Johnson's financial qualifications. As Midwest correctly notes, Johnson had failed to certify its financial qualifications in response to Section III of its original application. On April 4, 1988, Johnson submitted an amendment to its application to indicate that it has since become financially qualified. No showing of good cause accompanied the amendment. In its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. Title 47 C.F.R. § 73.3522(a)(6) provides that predesignation amendments addressing the acceptability or grantability of an application filed subsequent to the 30-day amendment-as-of-right period will be considered only upon a showing of good cause. Accordingly, pursuant to § 73.3522(a)(6), Johnson's April 4, 1988 amendment will be returned and an appropriate issue will be specified below. Furthermore, the petition to deny will be dismissed as moot.

3. *Sorenson.* In response to Section II, Item 9 of FCC Form 301 (1986 ed.), Sorenson indicates that it is in violation of the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. Accordingly, an appropriate issue will be specified below.

4. *Clear Channel.* On May 15, 1987, Clear Channel filed an application for a new FM station on Channel 298A to serve Columbus, Ohio (File No. BPH- 870515NN). The Columbus allotment was randomly selected for financial audit of all applications filed therefor pursuant to the Commission's *Public Notice*, FCC 87-97, 52 Fed. Reg. 17,333 (May 7, 1987). Should any adverse determination be made by the staff concerning Clear Channel's financial qualifications in the Columbus proceeding, appropriate issues would be sought in the Des Moines proceeding by the Bureau's Hearing Branch staff. Thus, no final determination is yet made on Clear Channel's financial qualifications to proceed with its instant application pending the outcome of the Columbus financial audit.

5. *Midwest.* On July 28, 1987, Midwest submitted an amendment to its application stating that it will install auxiliary generating equipment. Although this amendment was filed subsequent to the amendment-as-of-right period, no showing of good cause accompanied the amendment. *See* Paragraph 2, *supra*. Accordingly, pursuant to 47 C.F.R. § 73.3522(a)(6), the amendment will be returned without consideration.

6. *DMB.* In its application as originally filed, DMB was a general partnership called Des Moines Broadcast Associates. By amendment filed July 20, 1987, DMB changes its name to Des Moines Broadcast Limited Partnership and reports that the interests in its application had been conveyed from Des Moines Broadcast Partnership to Des Moines Broadcast Limited Partnership in which Abraham Sommerville is a general partner with 20% equity and Des Moines Broadcast Partnership is a limited partner with 80% equity. Furthermore, DMB states that because Sommerville had withdrawn from the Des Moines Broadcast Partnership, the ownership structure of the limited partner would be changed to distribute Sommerville's interest *pro rata* to the remaining partners. DMB's amendment fails to identify with particularity, however, the principals of Des Moines Broadcast Partnership, the amount of equity held by each principal, or indicate the role of the original applicant, Des Moines Broadcast Associates, in the application as amended. Accordingly, DMB will be required to submit a clarifying amendment to its application to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *SpaceCom.* In response to Section II, FCC Form 301, SpaceCom reports that it is wholly owned by Space Center, Inc., but failed to state that corporation's officers and directors. *See FCC 301 Instructions*, at 3. Accordingly, SpaceCom will be required to submit an amendment to its application containing the required information to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Chuckay.* In its application, as amended, Chuckay reports that its principals, Charles E. Putbrese and Ella Mae Putbrese, husband and wife, are employed by Norseman Broadcasting Corp., licensee of KWKY(AM), Des Moines, Iowa. Charles E. Putbrese also holds an ownership interest and is a director and officer of that licensee. Both principals state that they will terminate their employment and Charles E. Putbrese will divest his interest in KWKY(AM) should Chuckay's application be granted. A condition reflecting this commitment will be specified below.

9. *Other matters.* In response to Section VI, FCC Form 301, Johnson and Skywave indicate that they will each employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), they are required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. However, the EEO programs submitted by Johnson and Skywave are deficient. Johnson fails to identify specific sources of recruitment specializing in minority candidates and Skywave fails to identify specific sources of recruitment specializing in female candidates. Accordingly, Johnson and Skywave will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.[2]

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Clear Channel	July 23, 1987; August 21, 1987; October 6, 1987; November 17, 1987; December 9, 1987; March 2, 1988.
Santee	February 8, 1988.
SpaceCom	September 2, 1987; October 9, 1987; November 5, 1987; December 11, 1987; January 29, 1988; March 4, 1988.
Asterisk	December 22, 1987, February 1, 1988.
Sinclair	November 17, 1987.
High Tower	March 4, 1988.

11. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and from the following applicants have been unsuccessful. Accordingly, since no determination has been received that the towers proposed by the applicants below would not constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA will be made a party to the proceeding.

APPLICANTS: Sorenson, DMB, Santee, Chuckay.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Johnson whether, in light of the evidence adduced concerning the deficiency set forth above in this Order, Johnson is financially qualified;

2. To determine whether Sorenson is controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

3. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Sorensen, DMB, Santee, Chuckay.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 hereinabove, Johnson's April 4, 1988 amendment IS RETURNED and Midwest's petition to deny IS DISMISSED AS MOOT.

16. IT IS FURTHER ORDERED, That Midwest's July 28, 1987 amendment IS RETURNED.

17. IT IS FURTHER ORDERED, That, in accordance with paragraph 6 hereinabove, DMB shall submit a clarifying amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That, in accordance with paragraph 7 hereinabove, SpaceCom shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That in the event of a grant of Chuckay's application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Charles E. Putbrese and Ella Mae Putbrese have terminated their positions with Norseman Broadcasting Corp., licensee of KWKY(AM), Des Moines, Iowa, and that Charles E. Putbrese has divested his interest therein.

20. IT IS FURTHER ORDERED, That in accordance with paragraph 9 hereinabove, Johnson and Skywave shall each submit to the presiding Administrative Law Judge amendments to their Equal Employment Opportunity Programs within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated in paragraph 10 hereinabove: Clear Channel, Santee, SpaceCom, Asterisk, Sinclair, High Tower.

22. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of 80-90 Limited (File No. BPH-870430NF) was dismissed March 21, 1988, pursuant to the applicant's request.

[2] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy our EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-242

In re Applications of

NANETTE MARKUNAS File No. BPH-870331MD
(hereafter Markunas)

C&S RADIO CORPORATION File No. BPH-870331MO
(hereafter C&S)

JEFFREY A. SALKIN File No. BPH-870408KF
(hereafter Salkin)

For Construction Permit For a
New FM Station on Channel 284A,
Montauk, New York

HEARING DESIGNATION ORDER

Adopted: May 4, 1988; Released: May 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Petition to Deny*. On June 8, 1987, C&S asked the Commission to return the Salkin application as inadvertently accepted for tender because the coordinates of the proposed transmitter site set out in the application do not match the coordinates when plotted on the 7.5 minute topographic map.[1] C&S claims that the inconsistency renders Salkin's application untenderable under the "Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Are Otherwise Defective," Mimeo 4580, May 16, 1985. In its June 23, 1987 opposition, Salkin states that he complied with the public notice in that the geographic coordinates were provided. Salkin continues that "[a]ssuming, *arguendo*, that the coordinates were misplotted on the transmitter site map, that the error is an error not going to the acceptance of tender . . . but rather to acceptability for filing," *citing Letter to Churchville Broadcast Associates* (Ref. 8920-WED, May 14, 1987), returning an application as unacceptable for filing where the site was misplotted on the transmitter site map.

3. The Commission has consistently held that incorrect site coordinates are an acceptability rather than tenderability matter. *See , e. g., Letter to Churchville Broadcast Associates, supra*. Furthermore, timely-filed amendments may correct existing "acceptability" defects "so long as that amendment does not create a new conflict with an application filed prior to that amendment." *Reconsideration of Report and Order in MM Docket 84 - 750*, 50 Fed. Reg. 43157, 43158 (1985). Thus, Salkin's June 8, 1987 amendment properly eliminated any previous acceptability defects in his application, and C&S' informal objection will be denied.

4. *EEO*. In response to Section VI of FCC Form 301, C&S and Salkin have indicated that they will employ five or more full-time employees. Therefore, they are required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the recruitment sources for minority and female employees. C&S and Salkin have not provided these specific recruitment sources in their EEO Programs. Specifically, C&S has provided no female-oriented recruitment sources, and Salkin has apparently listed no minority or female recruitment sources.[2] Accordingly, both applicants shall amend their applications within 30 days of release of this Order by submitting specific sources of minority and female recruitment to the presiding Administrative Law Judge.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendments were filed after the the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Markunas	June 30, 1987, March 4, 1988

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That C&S' June 8, 1987 petition to deny Salkin's application IS DENIED.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Adminstrative Law Judge: C&S, Salkin.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Markunas.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Serivces Division, Mass Media Bureau.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Specifically, C&S states that pages 11 (Section V-B, Item 4), 17 (Section V-G, Item 1), and Exhibit V-3 list the antenna's coordinates at 41 degrees, 3 minutes, 4 seconds North Latitude, but that the site map places the actual site "some distance" from that point. In fact, C&S notes that "were the site to exist at the stated latitude, it would be located in the middle of Fort Pond Bay."

[2] In the event that Salkin has listed in its EEO program a recruitment source which would satisfy the EEO requirements but which is unfamiliar to the staff, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-244

In re Applications of

R. TYLER BLAND, JR. (hereafter Bland) — File No. BPH-870615MP

WEST POINT RADIO LIMITED PARTNERSHIP (hereafter WPR) — File No. BPH-870615NB

For Construction Permit for a
New FM Station on Channel 300A,
West Point, VA

HEARING DESIGNATION ORDER

Adopted: May 4, 1988; Released: May 20, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *WPR*. On November 4, 1987, Bland filed a Petition to Dismiss or Deny the application of WPR, alleging that WPR's certification of site availability was not based on reasonable assurances from the owner of the proposed site. On January 13, 1988 a subsequent Motion to Return Application was filed contending that the application was defective pursuant to 47 C.F.R. § 1.958.[1] The staff has determined that Bland's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications* ; *Amendment of Part 1 of the Commission's Rules*, 72 FCC 2nd 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered herein. However, an opportunity to raise these allegations will be afforded Bland post-designation pursuant to 47 C.F.R. § 1.229.

3. *Other Matters*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and WPR have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by WPR would consitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: WPR

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in light of the discussion in paragraph 2 the petitions to dismiss or deny filed by Bland are HEREBY DENIED.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding, subsequent to the date of adoption of this Order, shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] As the Notice of Acceptance for the WPR application was released on January 11, 1988, Bland's November 4, 1987 petition was prematurely filed. *See* 47 C.F.R. § 73.3584. On November 18, 1987 WPR filed a motion for extension of time to respond to Bland's petition. To date, no response has been received. Bland subsequently filed a Motion to Return on January 13, 1988 which was timely filed. However, Bland contends in this timely pleading that the application is deficient in that it violates Section 1.958 of the Commission's Rules. This particular rule section is in Subpart F-Private Radio Services Applications and Proceedings. Thus, procedurally and substantively, Bland's attempts to petition against the WPR application have been deficient.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 80-741

In the Matter of

An Inquiry Relating to Preparation for the International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It

SECOND REPORT AND ORDER

Adopted: March 24, 1988; Released: March 30, 1988

By the Commission:

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I. INTRODUCTION

1. In this *Second Report and Order*, we present our recommendations regarding the U.S. proposals to be presented to the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of Space Services Utilizing It (SpaceWARC) convening in August 1988. These recommendations will be forwarded to the Department of State for coordination with those of the National Telecommunications and Information Administration (NTIA). The Department of State will, in turn, forward the final U.S. proposals to the International Telecommunication Union (ITU). Our recommendations here are based on comments submitted in response to the Commission's Fifth Notice of Inquiry (*Fifth Notice)* in this proceeding,[1] and on the reports and information compiled by the various international and domestic groups that have been meeting since the conclusion of the First Session of the Conference in 1985 (WARC-ORB-85). Our recommendations address each of the agenda items for the Second Session of the Conference (WARC-ORB-88), focusing on planning methods for the Fixed-Satellite Service (FSS), several Broadcasting-Satellite Service (BSS) issues, and simplification of regulatory procedures.

2. This proceeding had its origins in 1979, when the World Administrative Radio Conference adopted a resolution to convene a two session World Administrative Radio Conference – SpaceWARC – to "guarantee in practice for all countries equitable access to the geostationary orbit and the frequency bands allocated to space services."[2] In 1980, the Commission instituted this proceeding to provide for public participation in preparation for both sessions of SpaceWARC. In light of agreements reached at WARC-ORB-85, [3] the agenda designated for WARC-ORB-88[4] and the work done during the intersessional period, several U.S. objectives for the outcome of the Second Session have been identified. These objectives are listed in the introduction to our proposals.[5] In keeping with these objectives, this *Report and Order* presents recommendations for proposals for U.S. positions to be taken at WARC-ORB-88.

II. BACKGROUND/INTERSESSIONAL ACTIVITIES

A. Fifth Notice of Inquiry

3. In May 1987, the Commission released its Fifth Notice in preparation for the Second Session of SpaceWARC. This notice delineated Commission preliminary views with respect to the items on the WARC-ORB-88 agenda and requested public comment. In response, eighteen entities filed comments on the various issues presented.[6]

4. In general, the comments were supportive of the Commission's preliminary views. While they might not be specifically addressed in this order, all of the issues and concerns raised by the commenters have been considered. Specific suggestions and recommendations are fully discussed.

B. International Activities

5. In addition to the intersessional work of the Commission, various international groups have been meeting in preparation for WARC-ORB-88. Extensive work is being conducted by various ITU components including the Administrative Council, the International Frequency Registration Board (IFRB), International Radio Consultative Committee (CCIR) and its Interim Working Parties (IWP) and Joint Interim Working Parties (JIWP). The *Fifth Notice* described these groups and their meeting schedules.[7] Since the *Fifth Notice* was released, additional preparatory meetings have taken place. Most significant were a series of meetings of the CCIR Study Groups 4 (Fixed-Satellite Service), 9 (Fixed Service Using Radio Relay Systems) and 10-11S (Broadcasting-Satellite Service) in November 1987 and the Joint Interim Working Party (JIWP-ORB-88) meeting in December 1987. The United States was represented at these meetings by both government and private sector participants, and reports of the results have been prepared by the CCIR.

6. Other scheduled international activities include an IFRB ORB(2) Information meeting which was held in March 1988, and an ITU Adminstrative Council meeting scheduled for June 1988 and a Region 2 Inter-American Telecommunications Conference of the Organization of American States (CITEL) meeting scheduled for the Summer of 1988. In addition, U.S. representatives will be involved in various other bilateral discussions in preparation for the Conference.

C. Domestic Activities

7. Domestically, preparatory work by the Commission's SpaceWARC Advisory Committee (SWAC) and its various working groups has continued.[8] Two reports of the full committee have been filed, one in June 1987 and one in March 1988, that present recommendations and proposals on the various Conference agenda items.[9] The various SWAC working groups have also recommended positions on various issues including suggestions for U.S. responses to circular letter requests for information from the IFRB.

8. In addition to private sector activities, U.S. government preparations as described in detail in the *FifthNotice* [10] are continuing. The Interdepartment Radio Advisory Committee's (IRAC's) Ad Hoc 178 group has been preparing recommended positions at its regularly scheduled meetings,[11] and National Aeronautical and Space Administration (NASA) staff members have expended considerable effort in the development of allotment plan software.

9. All intersessional work, including the resulting reports, recommendations and position papers, have been taken into consideration in developing the Commission's proposals. To the extent that these proposals differ from the preliminary views taken in the *Fifth Notice*, the changes reflect the evolution of thinking by interested parties participating in these extensive preparatory efforts.

III. PLANNING METHODS FOR THE FIXED - SATELLITE SERVICE

10. As described in detail in the *Fifth Notice*, a two part planning approach to the FSS was adopted at WARC-ORB-85. This approach was a compromise between the desire of some ITU member administrations to have a system of *a priori* planning of the geostationary-satellite orbit and FSS frequencies, and the goal of other countries, including the United States, to avoid certain spectrum utilization inefficiences inherent in *a priori* planning. The method agreed upon consists of two parts, an allotment plan that will apply to certain specified frequency bands[12] and improved procedures, possibly including multilateral planning meetings, that will apply in other FSS bands.[13]

11. As envisioned by WARC-ORB-85, the allotment plan will give every administration the ability to satisfy national service requirements within the fixed-satellite service from at least one allotment in the plan. Improved procedures, on the other hand, are intended to enhance the existing Radio Regulations that govern advance publication, coordination and notification of fixed-satellite systems. Together these methods will provide a guarantee in practice of equitable access to the geostationary satellite orbit, fulfilling the goal of SpaceWARC.

A. Allotment Planning

12. In the *Fifth Notice*, the Commission identified several issues with respect to allotment planning on which it requested public comment. These included the selection of frequencies to which the plan would apply, the development of the plan and its associated procedures, and the appropriate technical criteria and computer software to be used in conjunction with implementing the plan. The following discusses the Commission's proposals with respect to these issues.

1. Selection of Frequencies

13. The allotment plan concept adopted by the First Session is to be applied only to certain frequencies, specifically the 4500-4800 MHz frequency band, a 300 MHz segment to be selected from the 6425-7075 MHz band, the 10.70-10.95 GHz band, the 11.2-11.45 GHz band, and the 12.75-13.25 GHz band. In the *Fifth Notice*, we proposed 6725-7025 MHz as the uplink band at 6/4 GHz. We noted, however, that a more detailed analysis of the potential impact on terrestrial services was necessary before reaching a final decision, and we invited comment on this issue.

14. The commenters differed in their support of our preliminary selection. AT&T cited four issues that it asserted must be considered in selecting a 300 MHz segment: that spectrum is shared with other services; there is a possibility of interference into passive microwave sensors; the presence of existing systems; and an internal spacecraft harmonics problem must be avoided. After examining these issues, AT&T concluded that the Commission's selection of 6725-7025 MHz was appropriate. Comsat,[14] Geostar,[15] and Hughes also supported the Commission's selection.

15. Other commenters opposed the Commission's selection.[16] EIA, Harris, United and API maintained that if an allotment were implemented at 6725 to 7025 MHz, significant interference would be caused to terrestrial services. However, these entities did not suggest an alternative selection that would avoid terrestrial interference.

16. MST suggested the use of 6525-6825 MHz in order to avoid interference to the Auxiliary Broadcast Service operating at 6875-7125 MHz. MST stated that because Auxiliary Broadcast Service is a mobile service, coordination with mobile terrestrial facilities would be difficult. It acknowledged that a selection in the lower portion of the band at issue would impact on the Private Operational-Fixed Microwave Service (OFS) but asserted that coordination would be easier with a fixed service. In addition,

MST argued that because the OFS operates in the middle portion of the band at 6525-6875 MHz, OFS licensees will be required to coordinate regardless of which 300 MHz portion of the band is selected. Finally, Motorola urged the Commission not to recommend any portion of this band for allotment planning because of its use by terrestrial services.

17. In the *Fifth Notice*, we recognized that due to the wide use of this spectrum by services other than the Fixed-Satellite Service, virtually any choice of 300 MHz would affect some licensees. Further, we noted that the 7025-7075 MHz portion of the band was not feasible because of a potential internal spacecraft problem with respect to harmonics. Despite these concerns, we believe the results of WARC-ORB-85 dictate that we support the concept of allotment planning, including the selection of 300 MHz in the 6425-7075 MHz band for planning.

18. After review of the comments and in light of the SWAC-A working group's support of our initial recommendation, we reaffirm our original selection. If a domestic allotment were to be implemented, selecting 6725-7025 MHz would cause the least impact on terrestrial services. As stated in the *Fifth Notice*, any use of this spectrum by the Fixed-Satellite Service in the United States would have to be compatible with existing uses and a formal Rule Making proceeding would be necessary before we would authorize such use. The notice and comment provisions of a Rule Making proceeding would allow the interests of all affected licensees in terrestrial services to be fully considered.

2. United States Allotment Plan Requirements

19. In the *Fifth Notice*, we recognized that minimal U.S. allotment requirements must ensure complete coverage of all U.S. geographic areas. Since the release of the *Fifth Notice*, the FCC, after taking into account information provided by the SWAC, identified specific requirements that have been forwarded by the Department of State to the IFRB.[17] The IFRB has, in turn, compiled a file of allotment plan requirements submitted by all countries that it will use in its planning exercises.[18]

20. The U.S. submission to the IFRB indicated that the U.S. would require two orbit positions in both the 6/4 GHz and 14/11-12 GHz allotment bands. This would provide for coverage of the U.S., its territories, possessions and protectorates, which extend from about 140' West Longitude to about 64' West Longitude, at a minimum elevation angle of 10'. The U.S. stated its preference to serve the continental United States, Puerto Rico, and the Virgin Islands from one orbital location, and Hawaii and Alaska and the other U.S. interests in the Pacific Ocean from a second location using spot beams.

3. Allotment Plan Procedures

21. When the WARC-ORB-85 adopted the concept of allotment planning, it gave only general suggestions as to the procedures to be used to implement it. It recognized that procedures were necessary to modify and add allotments, to convert an allotment into an assignment, to permit additional FSS uses of the frequencies involved, and to deal with subregional systems. We requested comments and suggestions relating to the development of these procedures in the *Fifth Notice*.[19] Although we received few specific comments on this issue, the SWAC has endorsed a report developed by its SWAC-A Working Group.[20] We have carefully considered SWAC's recommendations. The following discussion highlights the significant aspects of our proposals regarding allotment plan procedures.

22. The Commission's proposal consists of a detailed set of procedures to be added as Appendix 30-B to the Radio Regulations. To the extent possible, our proposals have been modeled on the existing language of Appendix 30, which pertains to a plan adopted for the Broadcasting-Satellite Service. The procedures, which are designed to apply to the frequency bands designated by the Conference, are intended to enhance the guarantee of access inherent in the allotment plan by minimizing the burden placed on administrations wishing to implement allotments. The proposals address the status of existing systems, modification of allotments, the question of when an administration is affected by a modification to the plan for coordination purposes, and the formation of subregional systems.

23. The proposal defines "an allotment" as an entry in the plan that is identified by an administration and contains a predetermined arc, a specified bandwidth, and a service area that covers the territory of the administration. The definition of "existing network" is the same as that adopted by WARC-ORB-85. These networks are those that are recorded in the Master International Frequency Register, those for which the ITU coordination procedure has been initiated, or those for which the advance publication information has reached the IFRB by August 8, 1985. These networks are to be treated on an equal basis with planned allotments, although they may be subject to some adjustments that will be decided by the Conference.

24. We are also proposing procedures by which the characteristics of an allotment or an existing network may be modified, allotments may be added or cancelled, and subregional systems may be formed. We propose to include an Annex 1 containing the technical criteria to be used to determine whether the services of an administration are considered to be affected by a modification of the plan. Further study is necessary to identify the specifications to be included in Annex 1. The procedures contained in our proposals will accomplish the goal of guaranteeing to all countries access to the orbit while also maintaining flexibility for users who will be implementing systems in these allotment plan bands.

4. Computer Software and Technical Standards for Allotment Planning

25. The Commission continues to endorse the use of the Numerical Arc Segmentation Algorithm for a Radio Conference (NASARC) software program[21] in conjunction with the Orbit II program[22] to develop an allotment plan. NASARC is designed to generate groupings of satellites that can operate compatibly within a predetermined arc (PDA) because of the geographic isolation of their service areas. This program does not designate exact orbit locations but rather designates an orbital arc for each satellite. The size of the orbital arc or PDA depends on the number of administrations sharing the arc and the technical parameters decided by WARC-ORB-88. The Orbit II program, in turn, will use the results generated by the NASARC program to determine particular orbit positions and to produce placement scenarios to demonstrate the guarantee of access inherent in the allotment plan. Both programs will be used to develop the plan and Orbit II will remain in use by the IFRB to implement it.

26. To develop and implement an allotment plan, a set of standardized parameters and associated generalized parameters must be established at the Second Session of the Conference. Standardized parameters describe the communication satellite network used as the baseline to develop the allotment plan. Generalized parameters, which will be used to manage the plan after the Conference, prescribe the satellite network design envelope with respect to its interference causing potential and interference susceptibility. An administration would be able to implement, without coordination, an allotment with technical parameters different from the standardized parameters used in developing the plan, provided the satellite network conforms to the generalized parameters. These parameters should therefore be selected not only to provide for effective use of the geostationary-satellite orbit and the expansion frequency bands, but also to provide for flexibility, diversity of user applications, technology advancement and economical use of the service.

27. The JIWP-ORB-88 has made several recommendations on these issues. In particular, it has provided broad and flexible technical information sufficient to support our two-phase approach for allotment planning to develop a workable allotment plan and to select the generalized parameters to manage the plan. In addition, the IFRB, in its ORB System Report, has established a set of assumptions and standardized technical parameters for use in its intersessional allotment planning exercises.[23] The SWAC recommended several changes to these parameters.[24] SWAC's suggestions were designed to facilitate flexibility in the IFRB's exercises and to identify specific parameters more consistent with current fixed-satellite operational practices. We generally agree with SWAC's recommendations but believe that a detailed assessment of these parameters, using the NASARC and ORBIT programs, is necessary to ensure a workable worldwide allotment plan.

28. The SWAC-A working group also suggested discrete criteria to be used in allotment planning.[25] It stated that technical parameters used to develop and implement the plan will have a direct influence on the amount of geostationary-satellite orbit (GSO) resources needed to satisfy the overall allotment plan. It further stated that the technical parameters should be based on relatively advanced technology rather than low performance (relaxed) standards since its study has shown that approximately four times as many satellites can be accommodated with state-of-the-art equipment. Based on these assessments and the JIWP-ORB-88 report, the SWAC-A proposed specific recommendations for the following parameters: (1) earth station antenna radiation pattern, (2) satellite antenna radiation pattern, and (3) single-entry-to-aggregate interference ratio.

29. With respect to standardized technical parameters, the JIWP-ORB-88 has recommended templates for both earth station and satellite antenna radiation patterns. The earth station antenna pattern is a composite radiation template that combines two antenna sizes in the mainbeam region and incorporates two patterns in the sidelobe region, one for developing countries (32-25 log phi) and one for other countries (29-25 log phi). SWAC-A indicated that even though the composite pattern reflects, in part, U.S. contributions to the JIWP-ORB-88, the use of the composite pattern should depend upon its effect on the successful achievement of a satisfactory allotment plan.

30. The JIWP-ORB-88 has also identified a template for standardized satellite antenna radiation pattern that is a derivative of shaped-beam antenna design and the elemental beamlet concept. The template takes advantage of recent refinements of the modeling of "fast" roll-off performance characteristics of these antenna systems.[26] SWAC-A recommends that this pattern be adopted for allotment planning and incorporated into the planning software. We believe that this standardized radiation pattern would provide a relatively dense satellite allotment plan. However, we are concerned that the first sidelobe plateau of 25 dB below the mainbeam gain may not be adequate for colocating satellites whose coverage areas are relatively far apart.

31. Due to the complexity of the models and the variation of the assumptions, the JIWP-ORB-88 has not been able to recommend a single value for single-entry and aggregate interference levels. However, the JIWP-ORB-88 indicated it is customary to use the single-entry level between pairs of satellite networks as the pre-processing tool.[27] It further indicated that the aggregate interference level is used as the constraint to determine orbital spacing between satellites. The SWAC-A recommends a single-entry-to-aggregate interference ratio of 5 dB in the construction of the allotment plan. This proposal is relatively consistent with the 6 dB suggested by the IFRB in its intersessional allotment exercises.[28]

32. In addition to the above standardized parameters, other parameters are necessary to enable earth station and space station transmitter power to be computed.[29] These are: (1) earth station antenna size; (2) spacecraft and earth station receiver noise temperature; (3) uplink and downlink carrier-to-noise ratio; (4) reference bandwidth; and (5) rain attenuation. The JIWP-ORB-88 and SWAC-A reports discussed these technical parameters. However, neither report recommends specific values. We believe that this is due, in large part, to the fact that these and other technical parameters will be determined by the continuing efforts to develop a workable allotment plan using the NASARC and ORBIT programs. The Commission staff and Ad Hoc 178 have conducted many preliminary allotment planning exercises using various combinations of all of the above discussed parameters but results of these exercises are inconclusive as this time. As a result, we recommend that any U.S. proposal for standardized or generalized parameters be deferred until such time as the U.S. Delegation is able to properly evaluate all planning exercises generated by the U.S. or the IFRB for a worldwide allotment plan which includes existing systems.

33. As noted, generalized parameters will be used to manage the allotment plan after the Conference. Because of different implementation schedules of allotments in the plan and the advancement of satellite technology with time, it is highly unlikely that the satellite network parameters used in formulating the plan will be precisely the ones used in implementation. Therefore, we suggest that the set of generalized parameters chosen for managing the plan be flexible enough to accommodate a variety of network topology and traffic types, while maximizing the use of the orbit capacity and minimizing the need for subsequent coordination.

34. COMSAT indicated that "[t]he notion of generalized parameters has its origin in the desire to find a means by which to develop an allotment plan without having to consider specific transmission characteristics which are only known when allotments are implemented in the form

of real networks."[30] The IFRB used this concept to formulate its generalized parameter approach to the allotment planning exercises. COMSAT reaffirmed its view that the isolation concept[31] is preferable to others. The JIWP-ORB-88 has analyzed eight sets of generalized parameters and has concluded that each holds particular advantages. However, for allotment planning, JIWP-ORB-88 recommended that the generalized parameters should be based on one of the A, B, C, D approaches.[32] The SWAC-A report also analyzed the merit of all generalized parameters and preferred to use parameters that are based on single-entry interference criteria and power densities averaged over the signal bandwidth.[33] This is similar to the C/I approach used by the IFRB in its intersessional exercises. Therefore, we support the SWAC-A proposal over the COMSAT suggestion.

B. Improved Procedures Method

35. The second component of the overall planning method for the FSS that will be addressed at WARC-ORB-88 is improved procedures for specific FSS bands.[34] In the *Fifth Notice*, the Commission affirmed its belief that the current procedures for the advance publication, coordination and notification of frequency assignments for satellite systems, including those in the FSS, as set forth in Articles 11 and 13 of the Radio Regulations, have been used successfully in the past to provide access to the geostationary-satellite orbit and spectrum. The Commission proposed that, to the extent possible, the current procedures should be maintained and that proposals for improved procedures should be developed that would enhance the utility and equitability of the current procedures. These improved procedures would be the normal means for providing equitable access to the orbit-spectrum resource. In addition, the Commission proposed that the 20 and 30 GHz bands not be included in the improved procedures method at this time because there is little experience with technology or services for those bands.

36. In the *Fifth Notice* the Commission proposed two ways that the current procedures could be improved at the detailed coordination phase described in Article 11, Section 2. First, the Commission proposed that there should be guidelines for the agreement process to accommodate new or modified satellite networks. In this regard, we suggested that Radio Regulation (RR) 1085 be modified to include the "resolution of difficulties" provisions in RR 1050 through 1053 and that these guidelines be used for coordination of all satellite networks under Article 11, including the FSS. Second, we proposed that RR 1105 be modified so that, in the event of continuing disagreement in effecting coordination with two or more affected administrations, the proposing administration would have the option of convening an *ad hoc* meeting, referred to as a multilateral planning meeting (MPM), of the affected administrations in order to resolve specific problems in accommodating the new or modified network. The MPM would provide a forum for discussion and consensus resolution of outstanding interference problems identified during previously held bilateral discussions with affected administrations, thereby facilitating the securing of technical agreements with those administrations. To this end, specific MPM procedures were proposed in the *Fifth Notice*. In addition, the Commission suggested that, for the MPM process only, more specific guidelines for the agreement process on accommodating new or modified satellite networks be established. Finally, we proposed that all procedural details for MPMs, as well as guidelines for securing technical agreement at an MPM, be included in a Conference resolution.

37. In addition to the comments filed in response to the *Fifth Notice*, the issues presented by the improved procedures/MPM method have been considered by the SWAC-B and the IRAC Ad Hoc 178 Working Group 2A (Ad Hoc 178-2A). Internationally, the technical aspects of these issues have been studied by the CCIR through its IWP 4/1 study group, and various administrations and intergovernmental satellite organizations have circulated documents addressing these issues. We have considered the ideas presented by all of these sources in forming our recommendations for U.S. proposals on improved procedures.

38. The parties that commented in response to the *Fifth Notice* generally agreed with the Commission that the current procedures have worked well to provide access to the geostationary-satellite orbit and spectrum and that, to the extent possible, they should be maintained. In this regard, several commenters noted the large investment U.S. operators have made in the Fixed-Satellite Service, and they argued that existing, as well as new, satellite systems need a stable environment for continuing operational viability.[35] The commenters, however, generally agreed that the difficulty of the coordination process could be eased. In addition, they generally agreed with the Commission that it is premature to apply any improved procedures method to the 20 and 30 GHz bands.

39. As to the Commission's proposals regarding MPMs, the commenters generally agreed that if MPMs are used, they should be held on an occasional, *ad hoc* basis to consider specific technical issues in coordinating a new or modified network. The commenters generally did not favor MPMs that were regularly-scheduled.[36] There were, however, numerous suggested changes to some of the specific MPM provisions proposed in the *Fifth Notice*. Although most of the commenters agreed that an MPM should be held with affected administrations to consider specific technical issues, several commenters argued that an MPM should not be restricted to situations of continuing disagreement under RR 1105. AT&T argued that an administration should be free to call for an MPM at any point during the coordination phase and that MPMs should not be viewed as confrontations that would force resolution of conflicts. COMSAT suggested that MPMs might be convened as the first step after coordination is initiated in order to assess technical issues and to organize the bilateral negotiation process.[37] Suggested changes also were made regarding the Commission's proposals on guidelines for the agreement process on accommodating new or modified networks. Although most commenters agreed that the resolution of difficulties provisions should apply to the whole coordination process for all satellite networks under Article 11 procedures, the commenters generally disagreed with the proposal that more specific guidelines for accommodation be prescribed for the MPMs. COMSAT, for example, emphasized that coordination is essentially a negotiation process, and HBO argued that decisionmaking guidelines can not be prescribed because each coordination is unique.

40. Finally, several commenters suggested other means of ensuring equitable access to the orbit-spectrum resources. COMSAT, for example, suggested certain changes to the technical criteria used for determining viable orbit

locations and for identifying affected administrations.[38] Both HBO and AT&T favored continuing CCIR involvement in addressing technical issues affecting coordination.

41. The SWAC-B working group has carefully studied several alternative methods for improved procedures and MPMs. In its report,[39] SWAC-B concludes that the primary goal of U.S. efforts with respect to improved procedures at the Second Session should be to ensure that user and operator investments in satellite technology are not subjected to frequent and repeated review by an ITU-sponsored forum. In pursuit of this goal, SWAC-B recommends that: (a) the U.S. should seek to preserve the current coordination process to the greatest extent possible, and (b) if an MPM process is established, it should be developed as an adjunct to the current coordination procedures and MPMs should be held on an *ad hoc* basis for the coordination of a single satellite network.

42. SWAC-B advocates an MPM process that is similar to the Commission's proposal in the *Fifth Notice* but includes some significant differences. Under its proposal, an administration could request an MPM with two or more administrations with which coordination was sought under RR 1060. At the MPM, the parties would consider specific technical issues in accommodating the new or modified network under RR 1083-1085. Thus, the MPM could be held at any time once affected administrations are identified.[40] SWAC-B also recommends that the procedural guidelines for holding MPMs be included in a Conference resolution and that RR 1085 be modified to allow administrations to request an MPM in accordance with the resolution. SWAC-B's proposed resolution does not include guidelines for the agreement process at an MPM, as had the *Fifth Notice*, nor does SWAC-B endorse the Commission's proposal that the more general guidelines on resolution of difficulties be incorporated into Section 2 of Article 11 to cover all coordinations under the current procedures.

43. Concurrently with FCC/SWAC activities, the topics of improved procedures and MPMs were reviewed extensively by other domestic and international groups. In the U.S., the Ad Hoc 178 committee studied several different approaches to planning by improved procedures employing MPMs. Because so many practical difficulties with heavily structured MPMs were revealed over the previous two years, the committee decided not to endorse such an approach. Instead, the committee endorses an as needed ad hoc approach.

44. Internationally, the JIWP-ORB-88 has addressed several technical issues related to different example improved procedures methods that included MPMs. It assumed in each instance that the main purpose of the MPM would be to obtain harmonization among affected systems. At its meeting held in December 1987, the JIWP-ORB-88 studied the technical aspects of four example approaches to harmonization: (a) the normalized delta T/T method; (b) the link isolation method; (c) coordination with affected networks method; and (d) power density-averaging bandwidth method.[41] For each, it assumed the basic approach of three phases -- pre-MPM, MPM, post-MPM -- because the procedures themselves were not within the scope of the CCIR's work.

45. We believe that under method (c) -- coordination with affected networks -- the basic components of the current coordination/notification process would be retained. However, affected administrations could meet bilaterally or multilaterally to discuss orbit locations and to coordinate networks, and they would determine the exact methods for orbit selection and coordination. The CCIR would be a source for continual improvements to the coordination process. For example, it could develop methods for selecting orbit locations or resolving unacceptable interference concerns. The other example approaches studied by the JIWP-ORB-88 would, to different degrees, supplant the current procedures and the process of identifying orbit locations for new satellite networks. Although each approach was found to have some merit, the CCIR has not established a preference. Further, the JIWP-ORB-88 expressed concern that difficulties may arise in cases regarding multi-purpose, multi-band satellite networks when different regulatory procedures must be applied, and it cautioned that a compulsory MPM coordination procedure could complicate the implementation process.

46. The JIWP-ORB-88 also has studied a number of techniques to accomplish burdensharing[42] with regard to improved regulatory procedures. The JIWP-ORB-88 defined various burdensharing techniques and noted that they had been used in practice in many coordinations. However, because the impact of specific measures varies signficantly from one network to another, it would only give general guidance in this area.

47. The Commission has reviewed the comments filed concerning the improved procedures/MPM issues, and the intersessional activities of SWAC-B, Ad Hoc 178 and the JIWP-ORB-88. In particular, we have evaluated possible regulatory changes to effect the planning method described by the First Session as "improved procedures" in order to achieve the overall aim of equitable access to the GSO in the relevant frequency bands while protecting existing systems. We believe that substantial changes to the Radio Regulations to include additional procedural mechanisms will add to the complexity of the coordination process without any clear improvement in access to the orbit. As a result, we are recommending as U.S. proposals to the Second Session that, for specified frequency bands, new satellite systems be implemented under the current Articles 11 and 13 coordination/notification procedures.[43] Moreover, these proposals clarify that coordination under Article 11 already can be conducted either bilaterally or multilaterally. In addition, we are recommending that new satellite systems in the 20-30 GHz bands be implemented under the current Articles 11 and 13 coordination/ notification procedures.[44]

48. A significant factor in reaching our conclusion here is that there is no consensus at this time, either domestically or internationally, on how the current procedures could be improved by adopting a formal MPM mechanism. We believe that this is due in large part to an implicit recognition that coordination, which is essentially a negotiation process, is a dynamic, continuing process that should not be impeded by unnecessary constraints. An administration should have the flexibility to marshal available resources, including procedural mechanisms, as it sees necessary in order to conclude coordination in a timely and efficient manner. The current Article 11 procedures recognize these essential characteristics and do not prescribe the means by which coordination is to be accomplished. Thus, under current procedures, an administration may seek to coordinate its satellite systems with affected administrations either bilaterally or multilaterally. We are recommending minimum changes to these procedures.

49. Because successful coordination is a cooperative effort, we recommend that the U.S. propose that certain modifications be made to the advance publication procedures in Article 11, Section 1 to clarify that all potentially affected administrations are to cooperate in mutually resolving any difficulties that may arise in accessing the geostationary-satellite orbit.[45] However, we are not recommending any guidelines for the agreement process on accommodating new or modified satellite networks. Although we recognize that accommodation is an essential element of coordination, it would be extremely difficult to prescribe effective guidelines for this process because each situation is unique and must be evaluated on its own terms. On the other hand, the guidance offered by the CCIR in evaluating the various burdensharing techniques and their relative impacts at various stages of satellite system implementation will be useful to administrations as they prepare to negotiate coordination agreements.

50. In addition, we recognize that the complexity of the coordination process could also be eased by certain changes to the technical criteria used to select orbit locations and to identify affected administrations with whom coordination is required. In regard to orbit locations, the CCIR is currently studying various optimization methods for identifying orbit locations, and it has not yet made a recommendation in this area.[46] This can be a useful tool to assist administrations in identifying an orbital location. We recommend that the CCIR continue to study this issue.

51. Finally, we are recommending that the U.S. propose that Appendix 29 be modified to increase the threshold value of delta T/T, which is used to identify affected administrations with whom coordination is required, from 4% to 6%.[47] This change would reduce the number of required coordination cases for FSS systems.

IV. SIMPLIFIED REGULATORY PROCEDURES

52. As discussed in the *Fifth Notice*, the current Radio Regulations pertaining to space services have operated without major changes since the SpaceWARC of 1971. Review of those provisions demonstrates that, while there are some isolated problems, the present scheme has been responsive to the full range of administrations' requirements. All satellite systems now operating have been implemented as a result of successful application of procedures and technical standards prescribed by the Radio Regulations. However, in response to problems which have been encountered, some of which were recognized by WARC-ORB-85, the Commission recommends that the U.S. submit to the Second Session proposals for certain changes that generally would apply to space services and frequency bands not subject to planning. These changes are described below.

A. Network Coordination / Notification

53. The current regulatory procedures in Articles 11 and 13 require information to be submitted on a frequency assignment basis both for space stations on geostationary satellites and for earth stations communicating with these satellites. As a result, the IFRB has had to process numerous earth station frequency assignment notices that were not originally associated with a coordination request for the satellite network.[48] In order to reduce costs and procedural complexity without diminishing interference protection for the earth stations involved, we recommended in the *Fifth Notice* that Articles 11 and 13 be modified so that satellite systems would be coordinated and notified on a network, rather than a frequency assignment, basis. Our recommendation was generally supported by the commenters who responded to the *Fifth Notice* and by the SWAC-C working group.[49]

54. Therefore, we recommend as U.S. proposals to the Second Session that all coordination between geostationary satellite networks pursuant to RR 1060 should be on the basis of typical earth stations with an associated service area. We further recommend that the notification of assignments for a network should be on the basis of the space station and typical earth stations. This would allow earth stations that conform with the typical earth station parameters to be implemented without any additional coordination/notification requirement under RR 1060 vis-a-vis other geostationary satellite networks.

55. In accordance with these changes, the notification of the characteristics of a satellite network, including the typical earth stations used in the coordination procedure pursuant to RR 1060, should be performed by the administration responsible for the space station. New earth stations whose characteristics were not included in the original or subsequent coordination agreements should also be coordinated and notified on the basis of typical earth station characteristics by the administration responsible for the space station.[50]

56. In conjunction with the network coordination/notification concept, we also recommend that the U.S. propose certain other changes regarding the IFRB's examination of notifications and the International Frequency List (IFL). In addition, we are recommending certain modifications to the categories of information provided in Appendices 3 and 4 in order to implement the network coordination/notification concept. Certain modifications of the Radio Regulations that are needed to implement our recommendations concerning network coordination/notification are included in Appendix 3, Agenda Item 4. Additional consequential amendments to Appendix 3 are still being developed and will be submitted later.

B. Article 14

57. The current Article 14 procedures of the Radio Regulations are applied where a footnote in the Table of Frequency Allocations requires an agreement with an administration. Certain U.S. entities have experienced difficulty in effecting the necessary agreements in two distinct types of cases:

> (1) Where administrations responding under RR1617 have failed to provide at least basic characteristics of their stations whose services might be affected, or have delayed long beyond the recommended period of four months for providing such characteristics, or have failed altogether to provide such characteristics while still withholding agreement; or,
>
> (2) Where earth station agreements are required (particularly where mobile or transportable earth stations are involved), administrations are faced with having to comply twice with coordination procedures – once in effecting an agreement under the provisions of Article 14 and again in a normal Article 11 coordination.

58. In the *Fifth Notice*, we recommended certain changes to the Radio Regulations to improve each of these situations. Those recommendations have received general support from various industry and government sources. Thus, we recommend that the U.S. propose to the Second Session the modifications to Article 14 included in Appendix 3, Agenda Item 4.

C. Miscellaneous

59. The Commission recommends as U.S. proposals certain modifications to Appendix 28 concerning interference criteria for space research satellite systems, as presented in Appendix 3. The new values included in the proposal are based on a previous CCIR report and recommendation.[51] Other recommended proposals include modifications to Appendix 28 to add appropriate coordination criteria for Meteorological Satellite Earth Stations operating in the bands 1670-1700 and 1700-1790 MHz.

60. In addition, we are recommending that Appendix 29 be modified to increase the threshold value of delta T/T from 4% to 6% as presented in Appendix 3, Agenda Item 4. This change will generally reduce the number of coordinations required in other satellite services in unplanned bands.[52]

61. Finally, the Commission recommends that the U.S. Delegation to the Conference develop a proposal based on a SWAC recommendation that optional data be included in Appendices 3, 4 and 29 of the international Radio Regulations.[53] This optional information could be used in a power density-averaging bandwidth method for computing actual interference levels for coordinations under Article 11. Although more information would be provided at the outset of the coordination process using this optional approach, it may reduce the number of actual interference cases requiring detailed coordination under certain circumstances.

V. BROADCASTING SATELLITE ISSUES

62. As described in the *Fifth Notice*, several issues concerning the BSS will be addressed at WARC-ORB-88. These issues involve the planning of BSS feeder links in Regions 1 and 3, the possible introduction of sound BSS, the possibility of High Definition Television (HDTV) transmissions by the BSS, the correction of Appendix 30 of the Radio Regulations, and consideration of the long term applicability of Resolution No. 2 (SAT-R 2). These issues have been extensively investigated during the last year, both domestically within the SpaceWARC Advisory committee and internationally in connection with the preparation of the JIWP-ORB-88 technical report to the Second Session of the Conference. Comments in response to the *Fifth Notice* also proved helpful in conference preparations. These issues are discussed below.

A. Regions 1 and 3 Feeder Link Plan

63. The First Session recognized that feeder links for the BSS should be planned, and it identified the 14.5 to 14.8 GHz and 17.3 to 18.1 GHz frequency bands as available for these links. In order to facilitate planning, the First Session called for a program of intersessional activities. These activities included a request to the CCIR to provide information on several technical issues to the Second Session and a requirement that each administration submit its feeder link requirements to the IFRB, indicating the preferred frequency band, the proposed service area, and other technical information. If requirements were not submitted, the IFRB was to develop the information needed for planning from the downlink plan already in the Radio Regulations. This information was to be used by the IFRB to carry out its planning exercises, which, in turn, would be submitted to the Second Session. In the *Fifth Notice*, we requested comment on the U.S. requirements submission.

64. With respect to the technical issues involved in BSS feeder link planning, the CCIR has submitted a report to the Second Session that contains information on sharing criteria between feeder links and other services having primary allocations in the bands to be planned. It also includes information on the use of power control, which is a method of compensating for the fading of the feeder link signal due to varying propagation conditions. We support the conclusions of the CCIR report, as contained in Chapter 5 of the report of the JIWP-ORB-88, and will use the report as a basis for our technical proposals to the Conference on this agenda item.[54]

65. With respect to feeder link requirements, the United States submission was forwarded to the IFRB in July 1987. The U.S. identified requirements for several feeder link assignments to serve the Pacific Ocean area and stated that the 17.3-18.1 GHz band is the preferred frequency band.[55] It defined the service area in a manner that would permit the maximum flexibility in the locations from which the programming could be originated, consistent with probable need and satellite visibility.[56] In general, connectivity with the U.S. mainland was requested where it was possible.[57]

B. Appendix 30 Correction and Resolution No. 2 (SAT-R2)

66. At WARC-ORB-85, Appendix 30 of the Radio Regulations, which enunciates a plan for the BSS in Regions 1 and 3, was revised to incorporate the Region 2 BSS Plan. Several errors were made in this revision. Possible correction of these errors, based on a list of errors to be submitted by the IFRB after consultation with administrations, will be considered at WARC-ORB-88. A preliminary list was received from the IFRB in January 1988 and comments were submitted by the United States. In those comments, the U.S. noted that the IFRB had extended its review to encompass both Appendix 30 and Appendix 30A, which involves BSS feeder links, and had submitted the results of a general review of those appendices rather than merely a list of errors.[58] In general, the U.S. agreed that a review was valuable, and concurred with most of the IFRB's recommendations for clarification and correction. Because the IFRB has indicated that it will incorporate the comments of all administrations in its report to the Second Session, we see no need to submit any additional proposals on this agenda item until the IFRB report is available for examination.

67. As directed by the Agenda, the Conference also will complete consideration of the decisions of the Region 2 BSS conference by reviewing the possiblity of the long-term applicability of Resolution No. 2 (SAT-R2). This resolution, which applies on a provisional basis to Region 2 only, provides for the implementation of interim BSS systems not in conformity with the Region 2 plan. Under the resolution, first generation systems may be brought into use without the need to modify the plan upon agreement of all affected administrations and provided that the

noncompliant system is to be eventually replaced by a compliant system.[59] The Commission believes that the interim procedure contained in SAT-R2 must be applied on a long-term basis because it is essential to provide the necessary degree of flexibility for BSS operators in Region 2.[60] Therefore, we are recommending that the U.S. propose incorporation of SAT-R2 into the Radio Regulations for application in Region 2 by making Resolution No. 42 (ORB-85) permanent and including the provisions of the Annex to Resolution No. 2 (SAT-R2) explicitly in the text.

C. Satellite Sound Broadcasting

68. At the World Administrative Radio Conference in 1979, a resolution was adopted to study the possibility of an allocation for sound broadcasting satellites in the 0.5-2.0 GHz band. At WARC-ORB-85, it was decided that an exclusive worldwide allocation in this band would not be possible. However, the Conference called for continued study of this issue. In the *Fifth Notice*, we requested comments on the possibility of a sound BSS allocation.

69. In response to our request for comments in the *Fifth Notice*, only CBS stated that investigation of this technology should be pursued, and suggested that several bands now allocated to other satellite services should be considered for a sound BSS allocation. Motorola and Harris, in contrast, opposed an allocation, arguing that a sound BSS allocation would adversely impact existing users of the spectrum. Motorola discounted the possibility of a shared allocation by concluding that the practical effect of any allocation for sound BSS would be a reallocation and displacement of existing terrestrial users.[61]

70. Considerable progress, however, has been made by the CCIR in determining the parameters of possible sound BSS systems and the possibilities for sharing spectrum with other radio services.[62] The technical feasibility of these services has been established. The CCIR has concluded that in order to provide reliable service to automobile receivers, an allocation below 3 GHz is needed for sound BSS. Portions of this spectrum are already allocated to broadcasting, terrestrial fixed, mobile and other satellite services and any proposed revision of these allocations raises complex issues. Because of these existing uses, it will be difficult to identify an appropriate exclusive allocation for sound BSS. Therefore, further study is necessary to determine which system designs and frequency allocation approaches could be used to permit spectrum sharing with other services.

71. The CCIR has concluded that sharing could be possible on the basis of geographic separation. Geographic sharing means that the introduction of sound BSS services in a shared band would preclude the operation of other services in the same frequency in the BSS service areas and for some distance beyond. Clearly, any implementation of such a service would need to be consistent with a country's overall use of the spectrum. For this reason, the CCIR has given consideration to the utility of allocating a relatively wide band for sound BSS, within which individual countries could choose different sub-bands consistent with their differing use of the spectrum.

72. It is the Commission's view that the record in this area has not been developed sufficiently to support a concrete proposal at this time. We support the continuing efforts to further define system parameters, costs and spectrum sharing possibilities for this service which might be the basis of a U.S. proposal at a later time.

D. High Definition TV Allocation

73. The First Session of SpaceWARC recognized that a world-wide frequency allocation to the BSS suitable for HDTV transmission would be desirable.[63] It directed the Second Session to consider the question of a suitable frequency band for this service, preferably on a world-wide basis, including the need for possible action to change the Table of Allocations at a later competent conference.[64] It further invited the CCIR to study all issues relating to the technical criteria for this service and appropriate frequency bands. The *Fifth Notice* did not advance any preliminary proposals on these issues but requested comments on the suitability of the 12 GHz or 22 GHz band for an HDTV allocation.

74. The CCIR report reviewed the existing world-wide allocations to the BSS and concluded that some use of the existing 12 GHz band can be made for HDTV transmission using single-channel, highly compressed signal formats. However, the report concluded that the 12 GHz band, as planned, will not accommodate single wide radio frequency (RF) channel analog or digital HDTV signals on a world-wide basis.[65] The report generally discounts the applicability of other existing BSS bands for wide-RF channel HDTV, particularly when sharing with the fixed service or inter-satellite service would be required. This may result in severe constraints on the power or satellite location employed by BSS. In discussing possible new allocations from the perspective of propagation and sharing, the use of FSS bands in the Earth-to-space direction was considered. The 17.3-17.7 GHz band was favorably noted. In this FSS band, sharing with the BSS may be somewhat easier since there is no allocation to the fixed satellite service and the use of the FSS is limited to feeder links to the BSS.[66] However, the report concluded that further study of this option would be required to determine if it is a viable solution. Finally, the CCIR report concluded that a world-wide allocation to the BSS of 500 MHz, preferably not above 23 GHz, should be sought to enable the introduction of world-wide wideband HDTV, and noted that such an allocation would even be required for narrow-RF band HDTV in those countries already fully using their assignments in the Regions 1 and 3 BSS Plan.

75. No parties commenting in response to the *Fifth Notice* were in favor of allocating additional spectrum for the BSS. However, the CCIR's recent studies have produced significant new information on the feasibility of HDTV. Private sector groups, including the FCC Advisory Committee on the Advanced Television Service and SWAC, are also currently analyzing the prospect of this service. In light of the above, we are recommending that the U.S. propose to invite the CCIR to continue its studies with the goal of identifying a technically and operationally suitable frequency band and developing appropriate sharing criteria which would permit the future provision of wide-RF band HDTV by satellite.

E. MF Broadcasting - **(Revision of RR 480)**

76. In the *Fifth Notice*, we included, for information purposes only, a discussion of the planning of the 1605-1705 KHz band by the broadcasting service. [67] We noted that as a result of a Region 2 conference in 1986, RARC-86, No. 480 of the international Radio Regulations must be changed to reflect the fact that the plan for this band will be established for the entire Region 2.[68] We have concluded that this is not the appropriate proceeding

in which to establish the revised language for this regulation. We expect the revision to be drafted at a regional conference in May 1988. This text will then be referred to WARC-ORB-88 for adoption.

VI. ADMINISTRATIVE MATTERS

77. Pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, this Second Report and Order IS ADOPTED and IT IS ORDERED that the Second Report and Order and the attached recommended United States of America Proposals be transmitted to the Department of State. IT IS FURTHER ORDERED that this Second Report and Order be transmitted to the Chairman of the United States Delegation to the Conference for incorporation into the positions of the delegation.

78. IT IS FURTHER ORDERED that this proceeding is terminated.

79. Inquiries regarding this proceeding may be directed to Thomas S. Tycz, Deputy Chief, Common Carrier Bureau, Domestic Facilities Division at (202) 634-1860. Inquiries regarding Broadcasting-Satellite issues may be directed to Steve Selwyn, Mass Media Bureau at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] 2 FCC Rcd 3842 (1987).

[2] WARC-79 Resolution 3.

[3] *See Fifth Notice* at para. 7.

[4] *See* Appendix 1.

[5] *See* Appendix 2.

[6] The commenters were as follows: American Petroleum Institute (API); American Telephone & Telegraph Company (AT&T); CBS, Inc. (CBS); Communications Satellite Corporation (COMSAT); Association of Maximum Service Telecasters (MST); Electronic Industries Associations - Fixed Point-to-Point Committee (EIA); GTE Spacenet Corporation (GTE Spacenet); Geostar Corporation (Geostar); Harris Corporation - Farinon Division (Harris); Home Box Office, Inc. (HBO); Hughes Aircraft Company - Space & Communications Group (Hughes); M/A-Com Telecommunications,Inc. (M/A-Com); Motorola, Inc. (Motorola); North American Philips Corporation (Philips); Pan American Satellite (PanAmSat); Systematics General Corp. (SGC); U.S. Satellite Broadcasting Co. (USSB); and Utilities Telecommunications Council (UTC).

[7] *Fifth Notice* at paras. 9-15.

[8] The four SWAC working groups and their main tasks were: SWAC-A -- allotment plan; SWAC-B -- improved procedures; SWAC-C -- simplified procedures; and SWAC-D -- broadcast issues.

[9] Copies of these reports are included in the docket file of this proceeding.

[10] *See* para. 17.

[11] The IRAC makes its recommendations to NTIA, which is responsible for developing executive branch telecommunications policies.

[12] These bands are referred to as "expansion bands" and are not generally used by domestic satellite systems currently licensed by the Commission. However, several entities licensed by the Commission to provide international service intend to use a portion of this spectrum. These bands, particularly at 6/4 GHz, also are heavily used by terrestrial services. *See* para. 13, *infra*, for a description of these bands. Nevertheless, implementation of the allotment plan would not affect the orbital asssignments or operations of currently licensed domestic fixed-satellite systems.

[13] *See* paras. 35 through 51, *infra*.

[14] COMSAT cautioned against selection of spectrum between 6425 and 6500 MHz because this band will be used for the second generation INMARSAT Maritime feeder link.

[15] Geostar urged that the Commission not select that portion of the band allocated for Radiodetermination Satellite Service (RDSS) feeder links, *ie.*, 6525-6541.5 MHz.

[16] These were EIA, Harris, MST, Motorola, UTC and API.

[17] *See* IFRB Circular Letter No. 682 (February 25, 1987), requesting administrations to submit their allotment requirements.

[18] *See* IFRB Circular Letter No. 717 (December 18, 1987), Section 6, Allotment Planning Requirements.

[19] *Fifth Notice* at paras. 43-47.

[20] This report has been placed in the docket file of this proceeding.

[21] This program was developed by NASA's Lewis Research Center.

[22] This program was developed by Japan and was presented to the IFRB for use in its intersessional activities and in preparing the allotment plan.

[23] *See* ORB System Report, IFRB Circular-Letter Nos. 653, 668, 687, 691, 693, 704, 717.

[24] These recommendations were in response to IFRB Circular-Letter No. 704.

[25] *See* SWAC-A Report.

[26] Specifically, the pattern has the following characteristics: (1) the mainbeam is defined by a minimum area ellipse to cover the intended service area; (2) the mainbeam roll-off pattern depends on the size of the elemental beamlet; (3) the first sidelobe plateau is 25 dB below the mainbeam gain which extends between 2 and 4.5 times the elemental beamwidth from the edge of the service area; and (4) the sidelobe has -6 dB/octave slope extended to 0 dBi.

[27] For example, NASARC uses this parameter to determine which satellite networks can share a common predetermined arc.

[28] *See* ORB System Report, para. 2.6 of Section 3 to Chapter 2.

[29] These additional parameters are necessary because the earth station and space station transmitter power are input data to both NASARC and ORBIT II program.

[30] *See* COMSAT, Comments at Appendix 3.

[31] *See* WARC-ORB-85 Document 88.

[32] A, B, C, D are four parameters, two for the earth station and two for the space station. This set of generalized parameters limits the interference that a satellite network may generate and the susceptibility of the network to interference.

[33] This is one of the four variations of the A, B, C, D approaches.

[34] The First Session identified the following FSS bands for planning by improved procedures: 3700-4200 MHz; 5850-6425 MHz; 10.95-11.20 GHz; 11.45-11.70 GHz; 11.70-12.20 GHz in Region 2; 12.50-12.75 GHz in Regions 1 and 3; 14.00-14.50 GHz; 18.10-18.30 GHz; 18.30-20.20 GHz; 27.00-30.00 GHz.

[35] *See* Comments of AT&T, HBO and GTE Spacenet.

[36] Although AT&T said it agreed with the *Fifth Notice*'s proposal for *ad hoc* MPMs, it suggested as a possible alternative mechanism biennial meetings to identify tentative orbit locations for new systems that could be subsequently changed as new systems were actually proposed and implemented. In this regard, AT&T discussed the possibility of using the "zoning" concept to interleave satellites with non-overlapping coverage areas, which was addressed in the *Second Notice of Inquiry* in this docket in preparation for WARC-ORB-85. There was no support for AT&T's suggestion that MPMs might be convened to identify tentative orbit locations.

[37] As an additional matter, the majority of the commenters stated that they would not favor holding MPMs as world-wide meetings. HBO, for example, argued that regional MPMs would be less complex and less costly. Several commenters even suggested that improved procedures methods only be developed as regional procedures. *See* Comments of AT&T, GTE Spacenet and HBO.

[38] COMSAT proposed that administrations use the "isolation" concept, rather than the delta T/T calculations currently used, to determine if two satellite networks' orbit locations can be coordinated. It also suggested that a high-threshold, bandwidth-normalized C/I be used to identify "severely" affected administrations for coordination purposes.

[39] A copy of the SWAC-B report is included in the docket file for this proceeding.

[40] SWAC-B also proposes that MPMs be scheduled as required at a location agreed to by the participants. The participants at an MPM would select one of their group as chairman, and they also would determine their method of working and rules of procedures. The proposing administration would inform the IFRB of the results, if any, of the MPM in accordance with RR 1087.

[41] A copy of the JIWP-ORB-88 report is included in the docket file for this proceeding.

[42] The JIWP-ORB-88 report defines burdensharing as any cooperative acceptance of increase in intersystem interference, increased spacecraft performance or earth station performance, or more demanding operational requirements to a proposed or operational satellite system. It adds that the objective of burdensharing is to achieve equity in apportioning interference to the systems concerned. The JIWP-ORB-88 studied four elements: (a) identification of affected administrations; (b) techniques to accomplish burdensharing; (c) stages of satellite network development; and (d) determination of specific techniques to be used.

[43] *See* Appendix 3, Agenda Item 2.

[44] *See* Appendix 3, Agenda Item 2.

[45] *See* Appendix 3, Agenda Item 2.

[46] *See* the JIWP-ORB-88 report which is included in the docket file of this proceeding.

[47] *See* Appendix 3, Agenda Item 4.

[48] Since processing subsequent earth station notices would generally require the publication of a special section of the weekly circular, the Board has provisionally registered these assignments on the assumption that the characteristics of these earth stations were taken into account in any coordination agreements for the involved networks. If, after six months, the Board does not receive an objection regarding a particular assignment, the provisional nature of that entry is removed.

[49] A copy of the SWAC-C report is included in this docket file.

[50] These recommended changes would not alter the current procedures for earth stations being coordinated under the provisions of RR 1107. In those cases, earth stations generally would still have to be coordinated with each administration whose territory lies wholly or partly within the coordination area of the planned earth station.

[51] *See* CCIR, Report 985 and Rec. 609 (Geneva, 1986).

[52] The CCIR has recommended that the permissible interference level for certain space services be increased and has studied various methods for doing this, including increasing the delta T/T threshold values. *See* JIWP-ORB-88 Report.

[53] *See* SWAC Report.

[54] A copy of the JIWP-ORB-88 report is available in the docket file of this proceeding.

[55] A copy of the complete requirements submission, which was prepared with the assistance of the Advisory Committee, is available in the docket file of this proceeding.

[56] For example, a feeder link service area was requested that would permit an earth station in Hawaii to provide programs to a satellite serving the Caroline Islands, Guam, the Marianas Islands, Wake Island and the Marshall Islands. Another feeder link service area was requested that encompassed all those islands, permitting origination from any to all.

[57] Connectivity was not requested from the state of Alaska. If program origination in Alaska is required to serve the Region 3 territories, a connection using a fixed satellite to a BSS earth station within the requested feeder link service areas, such as Hawaii, could be used.

[58] A copy of our comments is available in the docket file in this proceeding.

[59] *See Fifth Notice* at para. 100 for a more detailed description of SAT R-2.

[60] As was discussed in the *Fifth Notice*, this issue has a possible impact on the INTELSAT system but it is anticipated that a resolution of this problem could be achieved by extending the existing bilateral arrangements to include interim systems.

[61] We recognize that these concerns can only be addressed in a domestic proceeding investigating the possible implementation of a sound BSS service, and are beyond the scope of this proceeding.

[62] *See* Chapter 6, Report to the Second Session. We note that the SpaceWARC Advisory Committee has specifically endorsed the CCIR's conclusions in this regard.

[63] An HDTV system allows viewing at a distance of about three times picture height such that the transmission system provides a level of detail nearly equivalent to the direct perception of the original scene by a viewer of average visual acuity. *See Fifth Notice* at para. 106 for a detailed description.

[64] *See* Recommendation No. 3, Report to the Second Session.

[65] We note that a solution to this problem would facilitate the orderly development of the BSS since such wide-RF HDTV channels may be required in a second generation approach to the BSS transmission of HDTV. However, since this issue addresses spectrum requirements that may only materialize in the longer term, we consider it to be inappropriate to advance a specific proposal at this time.

[66] This limitation should reduce the number of FSS earth stations that would share the band with the BSS earth stations.

[67] *See Fifth Notice* at paras. 109-110.

[68] This change must be made by a World Administrative Radio Conference pursuant to the ITU Convention.

R No. 953 WORLD ADMINISTRATIVE RADIO CONFERENCE ON THE USE OF THE GEOSTATIONARY-SATELLITE ORBIT AND ON THE PLANNING OF SPACE SERVICES UTILIZING IT (SECOND SESSION - GENEVA, 1988)

The Administrative Council,

considering

a) Resolution No. 1 of the Plenipotentiary Conference, Nairobi, 1982, relating to future conferences of the Union;

b) that Resolution No. 3 of the World Administrative Radio Conference, Geneva, 1979, invited the Administrative Council to take the necessary steps to convene a World Administrative Radio Conference consisting of two sessions relating to the use of the geostationary-satellite orbit and the planning of the space services utilizing it;

c) that Resolution No. 895 of the Administrative Council, 1983, included in the agenda of the First Session the recommendation of a draft agenda for the Second Session of the Conference for consideration by the Administrative Council;

d) the Final Acts of the First Session of the Conference and the Final Acts of the Regional Administrative Conference for the Planning of the Broadcasting-Satellite Service in Region 2, Geneva, 1983;

e) that the Second Session will need to consider:

1. proposals from administrations;

2. the Report of the First Session;

3. preparatory work carried out in the intersessional period;

4. the relevant reports from the IFRB and the CCIR;

5. the requirements for the allotment Plan submitted by administrations;

6. the requirements for the feeder links for the BSS submitted by administrations in Regions 1 and 3;

f) that during the revision of Appendix 30 at the First Session of WARC ORB(1), some minor errors may have occurred;

g) that Council, after having considered Recommendation No. 2 (COM5/B) of the First Session of RARC BC-R2, was able to accept only one element of this Recommendation (RR480);

considering further the results of the consultation conducted by circular telegram No. 4436 of 30 June 1986;

recognizing that some of the bands are allocated on a shared basis with equal rights to more than one space service and that most of them are also allocated with equal rights to terrestrial services, and that these rights must be taken into account;

resolves that the Second Session of the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and on the Planning of Space Services Utilizing It (WARC ORB(2)) taking due account of the radiocommunication services not specifically addressed in its agenda, be convened in Geneva on Monday, 29 of August 1988 for a period of five weeks and 3 days, with the following agenda:

1. to establish the Allotment Plan and the associated regulatory procedures, based on considering e) 1 to 5, for the fixed-satellite service in the bands:

- 4 500 - 4 800 MHz and 300 MHz to be selected in the band 6 425 - 7 075 MHz; and
- 10.70 - 10.95 GHz, 11.20 - 11.45 GHz and 12.75 - 13.25 GHz,

according to the principles and methods established at the First Session;

2. to establish the improved regulatory procedures, on the basis of considering e) 1 to 4, for the fixed-satellite service in the bands:

- 3 700 - 4 200 MHz
  5 850 - 6 425 MHz
- 10.95 - 11.20 GHz
  11.45 - 11.70 GHz
  11.70 - 12.20 GHz in Region 2[1]
  12.50 - 12.75 GHz in Regions 1 and 3[1]
  14.00 - 14.50 GHz
- 18.10 - 18.30 GHz[1]
  18.30 - 20.20 GHz
  27.00 - 30.00 GHz

according to the principles and methods established at the First Session;

3. to adopt appropriate technical standards, parameters and criteria, pertaining to the fixed-satellite service in the frequency bands specified in items 1 and 2;

4. to review and revise, as necessary, the regulatory procedures and appropriate technical standards, parameters and criteria pertaining to space services and frequency bands not to be subject to planning;

5. to review and revise, as necessary, the definitions relating to space services;

6. to establish the provisions and associated Plan for feeder links, in the bands 14.3 - 14.8 GHz (for countries outside Europe and for Malta) and 17.3 - 18.1 GHz, to stations in the broadcasting-satellite service in Regions 1 and 3 operating in accordance with Appendix 30 (ORB-85) to the Radio Regulations, on the basis of the relevant material identified in considering e), and to incorporate these decisions in the Radio Regulations, revising the Radio Regulations, as well as related Resolutions and Recommendations, only for these purposes as necessary;

7. to consider, subject to the adoption of a suitable feeder-link assignment Plan for Region 1, the amendment of the relevant Articles of the Radio Regulations and associated Resolutions and Recommendations, if it is appropriate, to permit the use of the band 10.7 - 11.7 GHz (Earth-to-space) in Region 1 for all modes of fixed-satellite service operation, taking into account the frequency bands identified for planning in items 1. and 2. above;

8. to consider the possible correction of minor errors in the revision of Appendix 30 (ORB-85) on the basis of a list to be submitted by the IFRB after consultation with administrations. Such corrections shall be made without impact on either Plan, on the interactions between the two Plans, or on the balance of the provisions relating to the various services in different Regions;

9. in accordance with Recommendation No. 2 of the First Session, to consider the results of the various up-to-date studies and, in reviewing the situation prevailing at that time, take appropriate decisions concerning the various aspects of satellite sound-broadcasting systems as outlined in Resolution No. 505 of WARC-79;

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1 In these bands the improved procedures shall apply between networks of the FSS only.

3.4
R 953

10. to review the possibility of the long-term applicability of Resolution No. 2 (SAT-R2), and to take a definitive decision on this matter;

11. in accordance with Recommendation No. 3 of the First Session of the Conference, and without prejudice to the present BSS allocation in the 22.5 - 23 GHz band in Regions 2 and 3, to consider the question of a suitable frequency band for the broadcasting-satellite service, preferably on a world-wide basis, to accommodate HDTV, including possible action as appropriate on the necessary changes to Article 8 at a later competent conference;

12. to make such consequential amendments in the Radio Regulations as may be necessitated by the decisions of the Second Session of the Conference;

13. to consider, revise as necessary, and take other appropriate action upon the relevant Resolutions and Recommendations;

14. to consider the report of the CCIR mentioned in "notes..." below and the question of making appropriate recommendations;

15. to consider and, if appropriate, revise No. 480 of the Radio Regulations only to the extent necessary to ensure that implementation of broadcasting stations in Region 2 in the band 1 605 - 1 705 kHz is without prejudice to the regional broadcasting plan adopted at the Second Session of RARC BC-R2;

16. to evaluate the financial impact of its decisions upon the budget of the Union in accordance with No. 627 and other pertinent provisions of the Nairobi Convention;

notes that in Recommendation No. 1, footnote 2, the First Session of the Conference has requested the CCIR to study the technical characteristics of the fixed-satellite service in the bands 18.10 - 18.30 GHz, 18.30 - 20.20 GHz and 27.00 - 30.00 GHz, and to report to the Second Session of the Conference with a view to taking a decision on the future planning of these bands by a future competent conference,

invites the IFRB and CCIR to ensure the timely completion of the preparation for the Conference,

instructs the Secretary-General to make all necessary arrangements for the convening of this Conference.

Ref. · Docs Nos. 6507, 6530 and 6535/CA4: (1986)

APPENDIX 2

United States Conference Objectives

OBJECTIVES

- to ensure that flexibility is preserved for the United States to utilize the geostationary-satellite orbit for all its national requirements including its separate international systems;

- to ensure that U.S. proposals and positions on the procedures and parameters for planning and related requirements are clearly conveyed to the IFRB and others at WARC-ORB-88;

- to ensure to the maximum extent possible that the planning principles concluded by the First Session are taken into consideration in the adoption of any software, associated techniques, and procedures for the allotment plan at the Conference;

- to ensure that workable Improved Procedures, which may include provisions for multilateral planning meetings (MPM) and procedures for their implementation as appropriate, are developed at the Conference;

- to simplify the procedures for bands and services not subject to either allotment planning or improved procedures;

- to adopt and incorporate into the Radio Regulations a 17 GHz feeder link plan and associated procedures for Regions 1 and 3 that fully protects the interests of Region 2 while providing necessary flexibility to future BSS operators in those Regions and maximum commonality of equipment with BSS operations in Region 2;

- to explore the full range of options available for the future provision of sound and HDTV services by the BSS and to ensure that the interests of all space and terrestrial services are adequately taken into account in any decisions of WARC-ORB-88;

- to adopt any necessary changes to RR 480 pertaining to MF broadcasting; and

- to urge that the ITU continue to strive to constrain its expenditures to the limits established by the Plenipotentiary Conference, Nairobi, 1982 and to reallocate expenditures within those limits to carry out any decisions of WARC-ORB-88 until the next Plenipotentiary Conference reviews the situation and establishes new budget limitations.

- to ensure that certain frequency bands used by the United States Government continue to be excluded from either <u>a priori</u> or improved procedures planning.

APPENDIX 3

United States Proposals
for
WARC-ORB-88

United States of America

Proposals to the World Adminstrative Radio Conference
on the Use of the Geostationary-Satellite Orbit
and the Planning of the Space Services Utilizing It,
Geneva, 1988

General Comments

The United States of America reaffirms its commitment to the historic purposes of the International Telecommunication Union (ITU). The ITU's self-evident accomplishments in improving world-wide cooperation and promoting more efficient use of the radio spectrum and geostationary-satellite orbit (GSO) have been commendable. In recognition of this record, the USA continues to be committed to achieving agreement among all administrations on pragmatic, workable ITU arrangements.

The current regulatory regime was established pursuant to Article 33 of the International Telecommunication Convention and is embodied in Articles 11 and 13 of the Radio Regulations. This regime has, in practice, enabled all administrations to access the GSO and the frequency bands allocated to space services to meet their common and individual telecommunication requirements in all services and bands for which such access has been sought. The fact that all satellite networks proposed by administrations have been accommodated is testimony to both the effectiveness of the ITU as an international cooperative forum and the methods and procedures it has developed. Nevertheless, concern by many administrations over future access to the GSO and the frequency bands allocated to space services resulted in the convening of a World Administrative Radio Conference on Space Services (SpaceWARC) whose aim was to improve the arrangements for these bands and provide all administrations with guaranteed equitable access, in practice, to the GSO.

The First Session of this Conference concluded in 1985 after having reached only preliminary conclusions on several important issues regarding the Fixed-Satellite Service (FSS). In particular, the nature of the dual planning method adopted for the FSS was not clearly defined by the Conference Report to the Second Session. Many complex issues remain to be addressed by the Second Session of this Conference.

For the past three years, many administrations, including the USA, have been preparing for the Second Session of the Conference. Further, a considerable amount of the technical preparatory work was accomplished in the International Radio

Consultative Committee (CCIR) study groups and by the International Frequency Registration Board (IFRB). The CCIR Report to this Conference, as well as contributions from various administrations, will provide valuable technical support for much of the work to be done at the Second Session. In addition, the IFRB's intersessional activity as described in the ORB System Report and the results of its allotment planning exercises will be instrumental in addressing the planning aspects of both the fixed-satellite service and the feeder links for the broadcasting satellite service.

The USA has invested heavily in the satellite industry and relies heavily on communications satellites to satisfy both international and domestic telecommunications needs. Our experience in the development and implementation of satellite systems has demonstrated that flexibility is needed both to encourage technical advancements in satellite systems and to ensure efficient use of a limited resource. The USA believes that this experience can be usefully applied at this Conference in developing methods for accommodating future satellite requirements throughout the world.

Agenda Item 1: Fixed-Satellite Service allotment planning.

The primary goal of SpaceWARC is to "guarantee in practice for all countries equitable access to the geostationary-satellite orbit and the frequency bands allocated to space services." At the First Session, different approaches were advocated to further this goal. Many of the countries, including the USA, which have established communications satellite systems, favored a flexible approach that did not impose a priori type frequency and orbit assignment planning. These countries wished to avoid the technical and orbit utilization inefficiencies inherent in rigid planning. Other member countries expressed support of a priori planning of Fixed-Satellite Service bands in order to guarantee access to the geostationary-satellite orbit.

As a result of a compromise reached at the First Session, the Conference adopted a two-part planning mechanism -- allotment planning and improved procedures. An allotment plan will be applied to certain designated frequency bands and improved regulatory procedures will be used in other FSS bands.

At the First Session, the USA had serious reservations concerning the allotment planning approach. In particular, there were reservations concerning the amount of spectrum to be included in the plan. However, in reviewing the results of the Conference, the USA has recognized that an FSS allotment plan will be an important component in satisfying the perceived need of many countries to have an explicit guarantee of equitable access in practice. Thus, the USA has participated in extensive intersessional work to develop software and to perform numerous allotment planning exercises. Our intersessional work has focused on ways to satisfy the requirements of administrations for national systems, while introducing flexibility into the plan to provide for modifications, additional requirements or subregional systems. Our proposals address the construction of and associated regulatory procedures for an allotment plan that will provide access to the geostationary-satellite orbit for all countries while maintaining a certain amount of flexibility for the implementation of satellite systems using these designated frequency bands.

As proposed herein the allotment plan would be based on the concept of common overlapping arc segments called predetermined arcs. This planning technique consists of two phases. The first phase uses a computer program to identify orbital arc segments common to groups of administrations having compatible requirements. These satellites within the arc segments are able to operate compatibly because of the geographic separation of their service areas. The administrations sharing a common

predetermined arc would be able to position their satellites at a number of orbit locations within the arc segment.

The second phase of the allotment plan uses a general synthesis computer program, such as ORBIT II, to demonstrate that the predetermined arcs created in the phase one process would guarantee each administration access to the geostationary-satellite orbit by identifying illustrative scenarios of orbit locations for administrations' satellites. Completion of these two phases would have identified an allotment plan that would permit each administration to satisfy its allotment requirements from any one of a number of possible orbital locations within the predetermined arc.

After the conference, when an administration wished to convert an allotment into an assignment, the administration would select an orbital position within its predetermined arc. A synthesis computer program, such as ORBIT II, would be exercised to demonstrate that for this selection of orbit position, all remaining allotments would be accommodated. This guarantee of access would be demonstrated by the synthesis program producing a scenario of space station positions containing all of the allotments. The use of both of these computer programs will be based on certain standardized and associated generalized parameters. Completion of these two phases will produce an allotment plan that would permit each administration to satisfy its requirements from any one of a number of orbital locations within the predetermined arc.

The USA believes that this allotment planning approach will best further the goal of guaranteeing access to the orbit while ensuring flexibility in implementation and reducing the number of necessary agreements among administrations when modifying the plan. The application of the two-phase approach of the allotment plan and the associated procedures will allow all administrations to fulfill their present needs and long-term requirements of access. This guarantee entitles each administration an orbital position within the predetermined arc and interference protection for their services.

Selection of Frequencies

While several specific frequencies were designated for allotment planning by the First Session, a 300 MHz segment from the 6425-7075 MHz band was directed to be selected as the uplink portion at 6/4 GHz. The USA proposes that 6725-7025 MHz be chosen as the 300 MHz segment to be included in the plan. This selection would avoid a internal spacecraft harmonics problem that might occur if the 7025-7075 MHz portion were selected. In addition, the selection of 6725-7025 MHz would result in the

USA/ / 1

least impact on existing terrestrial services in the frequencies subject to planning.

Construction of the Allotment Plan

USA/ /2 The USA proposes that each administration be guaranteed
USA/ /3 one allotment to cover its geographic service area and proposes that allotments be able to be implemented by administrations without seeking agreement from other administrations (i.e., coordination) as long as the systems are within the bounds of the generalized parameters adopted by the Conference. The USA
USA/ /4 proposes that if implementation of an allotment exceeds the limits of these adopted technical parameters, implementation may nevertheless be accomplished if agreed to by other affected administrations but that all allotments would be protected at all times.

USA/ /5 The USA proposes that subregional systems involving groups of several administrations be accommodated in the allotment plan in the same manner as a single allotment. These subregional systems need to be identified by the particular administrations as a specific requirement at the Conference. The USA believes that associated procedures and technical criteria can be used to accommodate future sub-regional systems after the Conference.

USA/ /6 The USA proposes that predetermined arcs be based on concept of common overlapping arc segments.

USA/ /7 The USA proposes that these predetermined arcs be identified by a computer program which generates predetermined arc segments common to groups of administrations whose satellites are compatible based on geographic separation of the service areas. This program is to be used in the construction of the plan.

USA/ /8 The USA proposes that a synthesis computer program use the results of the predetermined arc program to produce orbit placement scenarios that demonstrate the guarantee of access, and that the synthesis program be available to continue to demonstrate the guarantee of access as administrations convert allotments in the Plan to assignments.

USA/ /9 The USA further proposes that during the conference the planning exercises be conducted separately as well as combined in each set of frequency bands.

Standardized and generalized technical parameters necessary to construct and implement the plan are needed. The USA intends to submit proposals on these technical matters at a later date.

Regulatory Procedures Associated with the Allotment Plan

Because WARC-ORB-85 did not specifically address the details of an allotment plan, many of the plan's components, including the associated procedures, were not identified. It was believed that intersessional activities would provide the structural basis for a particular type of allotment plan. Among the procedures generally identified as necessary in the Report to the Second Session were those addressing implementation or modification of allotments, the combination of allotments to form subregional systems, and the accommodation of existing systems.

Taking into account these general guidelines and other pertinent issues that have emerged in intersessional meetings, the USA is proposing that Appendix 30B be added to the Radio Regulations. These proposed procedures set forth the regulations to implement the plan and reference associated Annexes to determine whether an administration is affected by proposed modifications of the plan. Annex 2 prescribes the form of the notice an administration must give when it intends to bring into use a frequency assignment implementing an allotment or existing network in the plan. Because these two Annexes require further development, the USA intends to submit additional proposals containing their details at a later date.

USA/ /10
ADD

APPENDIX 30B

Allotment Plan for the Fixed-Satellite Service in the Frequency Bands 4500-4800 MHz, 6725-7025 MHz, 10.7-10.95 GHz, 11.2-11.45 GHz, and 12.75-13.25 GHz

Article 1

General Definitions

1. For the purpose of this Appendix the following terms shall have the meanings defined below:

1.1 Conference: World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Utilizing It. First Session, Geneva, 1985; Second Session, Geneva, 1988.

1.2 Plan: The list of allotments and existing networks appearing in Article 7 and the associated procedures for their implementation.

1.3 Predetermined arc: A geostationary-satellite orbital arc segment identified for use by a group of administrations having compatible requirements.

1.4 Allotment: Entry in the Plan identified for use by an administration. Each allotment is identified by:

- an administration,
- a predetermined arc (identified by the western and eastern longitudinal limits in degrees from the Greenwich meridian) within which an administration shall be able to position a satellite to serve its service area(s),
- a bandwidth of 300, 500 or 800 MHz in both the Earth-to-space and the space-to-Earth directions of transmission, and
- a service area.

1.5 Frequency assignment in conformity with the Plan: Any frequency assignment which implements an Allotment or one for which the procedure of Article 4 of this Appendix has been successfully applied.

1.6 Existing network: a network in the Fixed-Satellite Service operating in the frequency bands, or part of the frequency bands, referred to in this Appendix and

a) which is recorded in the Master International Frequency Register;

b) for which the coordination procedure has been initiated; or

c) for which the information relating to advance publication was received by the Board before August 8, 1985.

Each existing network in the bands mentioned in this Appendix has been included in the Plan on an equal basis with planned allotments and may have been subject to some adjustments.

ARTICLE 2

General Provisions

2.1 The provisions of this Appendix apply to the fixed-satellite service in the frequency bands between 4500 and 4800 MHz, between 6725 and 7025 MHz, between 10.7 and 10.95 GHz (space-to-Earth), between 12.75 and 13.00 GHz, between 11.2 and 11.45 GHz (space-to-Earth), and between 13.00 and 13.25 GHz.

2.2 The Plan, as prescribed by this Appendix is limited to national systems providing domestic service, subregional systems serving more than one administration, when such administrations so initially requested or have so modified their requirement through the application of the procedures in Article 4, and the services of existing networks as defined above which have been included in the Plan.

ARTICLE 3

Execution of the Provisions and Associated Plan

3.1 The Members of the Union shall adopt, for their fixed-satellite stations operating in the frequency bands referred to in this Appendix, the characteristics specified in the Plan.

3.2 The Members of the Union shall not change the characteristics, or bring into use assignments to fixed-satellite stations, or stations in the other services to which these frequency bands are allocated except as provided for in the Radio Regulations and the appropriate Articles and Annexes of this Appendix.

ARTICLE 4

Procedure for Modifications to the Plan

4.1 When an administration (or one acting on behalf of a group of named administrations) intends to make a modification to the Plan, that is, either

a) to modify the characteristics of an allotment or an existing network appearing in the Plan or for which the procedure in this Article has been successfully applied, whether or not the station has been brought into use; or

b) to add an allotment to the Plan; or

c) to cancel an allotment; or

d) to modify a national allotment appearing in the Plan into a subregional allotment for the purpose of joint development of a fixed-satellite system, in the frequency bands referred to in this Appendix, with a view to covering all administrations within the subregional group using allotment(s) belonging to administrations in the group,

the following procedure shall be applied before any notification of the frequency assignment, resulting from implementation of an allotment, is made to the International Frequency Registration Board (see Article 5 of this Appendix).

4.2 <u>Proposed modification to an allotment or existing network appearing in the Plan or the inclusion in the Plan of a new allotment</u>

4.2.1 An administration proposing a modification to an allotment or existing network, or the inclusion of a new allotment in the Plan, shall seek the agreement of those affected administrations having an allotment or existing network, including those in respect of which proposed modifications to the Plan have already been published by the Board. The services of an administration are considered to be affected when the limits shown in Annex 1 would be exceeded.

4.2.2 An administration proposing a modification to the Plan shall send to the Board, not earlier than five years but preferably not later than eighteen months before the date on which the assignment is to be brought into use, the relevant information listed in Annex 2. Modifications to the Plan involving additions, except those establishing the initial allotment for a country, shall

lapse if the assignment is not brought into use by five years after the allotment is entered in the Plan.

4.2.2.1 Where as a result of the intended modification to the Plan the limits defined in Annex 1 are not exceeded, this fact shall be indicated when submitting to the Board the information required. The Board shall then publish this information in a special section of its weekly circular.

4.2.2.2 In cases where the limits defined in Annex 1 are exceeded, the administration shall notify the Board of the names of the administrations whose agreement it considers should be sought in order to arrive at agreement, as well as of those with which agreement has already been reached.

4.2.3 The Board shall determine on the basis of Annex 1 administrations whose services are considered to be affected. The Board shall include the names of those administrations with the information received under paragraph 4.2.2.2 and shall publish the complete information in a special section of its weekly circular. The Board shall immediately send the results of its calculations to the administration proposing the modification to the Plan.

4.2.4 The Board shall send a telegram to the administrations listed in the special section of the weekly circular drawing their attention to the information it contains and shall send them the results of its calculations.

4.2.5 An administration which feels that it should have been included in the list of administrations whose services are considered to be affected may, giving the technical reasons for so doing, request the Board to include its name. The Board shall study this request on the basis of Annex 1 and shall send a copy of the request with an appropriate recommendation to the administration proposing the modification to the Plan.

4.2.6 The administration seeking agreement or the administration with which agreement is sought may request additional technical information it considers necessary. The administrations shall inform the Board of such requests.

4.2.7 Comments on the information published pursuant to 4.2.3 from administrations whose services are considered by the Board to be affected should be sent either directly to the administration proposing the modification or through the Board. In any event the Board shall be informed that comments have been made.

4.2.8 An administration which has not notified its comments either to the administration seeking agreement or to the Board, within a period of four months following the date of the weekly circular referred to in 4.2.3 or 4.2.2.1, shall be understood to have agreed to the proposed modification. This time limit may be extended by up to three months for an administration which has requested additional information under 4.2.6 or for an

administration which has requested the assistance of the Board under 4.2.16. In the latter case the Board shall inform the administrations concerned of this request.

4.2.9 If, in seeking agreement, an administration modifies its initial proposal, it shall again apply the provisions of 4.2.2 and the consequent procedure with respect to any other administration whose services might be affected as a result of modifications to the initial proposal.

4.2.10 If no comments have been received on the expiry of the periods specified in 4.2.8, or if agreement has been reached with the administrations which have made comments and with which agreement is necessary, the administration proposing the modification may initiate the appropriate procedures in Article 5 of this Appendix and shall inform the Board, indicating the final characteristics of the frequency assignment together with the names of the administrations with which agreement has been reached.

4.2.11 The agreement of the administrations affected may also be obtained, in accordance with this Article, for a specified period.

4.2.12 When the proposed modification to the Plan involves developing countries, administrations shall seek all practicable solutions conducive to the development of the telecommunication systems of these countries.

4.2.13 The Board shall publish in a special section of its weekly circular the information received under 4.2.10 together with the names of any administrations with which the provisions of this Article have been successfully applied. The allotment or existing network concerned shall enjoy the same status as those appearing in the Plan. Any frequency assignment which implements this allotment or existing network will be considered as being in conformity with the Plan.

4.2.14 When an administration proposing to modify an allotment or existing network or to create a new allotment receives notice of disagreement from an administration whose agreement it has sought, it should first endeavor to solve the problem by exploring all possible means of meeting its requirement. If the problem cannot be solved by such means, the administration whose agreement has been sought should endeavor to overcome the difficulties as far as possible, and shall state the technical reasons for any disagreement if the administration seeking the agreement requests it to do so.

4.2.15 If no agreement is reached between the administrations concerned, the Board shall carry out any study that may be requested by these administrations; the Board shall inform them of the result of the study and shall make such recommendations as it may be able to offer for the solution of the problem.

4.2.16 An administration may at any stage in the procedure described, or before applying it, request the assistance of the Board, particularly in seeking the agreement of another administration.

4.2.17 The relevant provisions of Article 5 of this Appendix shall be applied when frequency assignments implementing allotments or existing networks in the Plan are notified to the Board.

4.3 Cancellation of allotment or an existing network

When an allotment or existing network in the Plan is no longer needed, the administration concerned shall immediately so inform the Board. The Board shall publish this information in a special section of its weekly circular and delete the allotment or existing network from the Plan.

4.4 Master copy of the Plan

4.4.1 The Board shall maintain an up-to-date master copy of the Plan, taking account of the modifications as a result of the application of the procedure specified in this Article.

4.4.2 The Secretary-General shall be informed by the Board of modifications made to the Plan and shall publish an up-to-date version of the Plan in one or more appropriate forms when justified by the circumstances.

ARTICLE 5

Notification, Examination and Recording in the Master Register of Frequency Assignments Implementing Allotments or Existing Networks in the Plan

5.1 Notification

5.1.1 Whenever an administration intends to bring into use a frequency assignment implementing an allotment or existing network in the Plan, it shall notify this frequency assignment to the Board. For this purpose, the notifying administration shall apply the following provisions[1].

5.1.2 For any notification under 5.1.1, one notice for each network shall be drawn up as prescribed in Annex 2. It is recommended that the notifying administration should also supply any other data it may consider useful.

5.1.3 Each notice must reach the Board not earlier than three years before the date on which the frequency assignment is to be brought into use. In any case, the notice must reach the Board not later than three months before that date[2].

5.1.4 Any frequency assignment the notice of which reaches the Board after the applicable period specified in 5.1.3 shall, where it is to be recorded, bear a remark in the Master Register to indicate that it is not in conformity with 5.1.3.

5.1.5 Any notice made under 5.1.1 which does not contain the characteristics specified shall be returned by the Board immediately by airmail to the notifying administration with the relevant reasons.

5.1.6 Upon receipt of a complete notice, the Board shall include its particulars, with the date of receipt, in its weekly circular which shall contain the particulars of all such notices received since the publication of the previous circular.

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[1]Each earth station must complete the coordination required by Section III of Article 11 of the Radio Regulations if its coordination contour calculated pursuant to Appendix 28 of the Radio Regulations extends into the territory of another administration. Each such earth station shall be notified individually pursuant to Article 13 of the Radio Regulations.

[2]Where appropriate, the notifying administration shall initiate the procedure of Article 4 of this Appendix for modifying the Plan in sufficient time to ensure that this limit is observed.

5.1.7 The circular shall constitute the acknowledgement to the notifying administration of the receipt of a complete notice.

5.1.8 Complete notices shall be considered by the Board in the order of receipt. The Board shall not postpone its finding unless it lacks sufficient data to reach a decision; moreover, the Board shall not act upon any notice which has a technical bearing on an earlier notice still under consideration by the Board until it has reached a finding with respect to such earlier notice. If the Board can not act promptly, due notice shall be given to the notifying administration.

5.2 Examination and recording

5.2.1 The Board shall examine each notice:

a) with respect to its conformity with the Convention and the Radio Regulations with the exception of those provisions relating to the probability of harmful interference; and

b) with respect to its conformity with the Plan; or

c) with respect to its conformity with the Plan through the use of parameters which could cause less interference to any other allotment or existing network.

5.2.2 Where the Board reaches a favorable finding with respect to the provisions of 5.2.1, the assignment shall be recorded in the Master Register with the date of [1 January 1990] in column 2d.

5.2.3 Whenever a frequency assignment is recorded in the Master Register, the finding reached shall be indicated by a symbol in Column 13a.

5.2.4 Where the Board reaches an unfavorable finding with respect to 5.2.1, the notice shall be returned immediately by airmail to the notifying administration with the reasons of the Board for this finding and with such suggestions as the Board may be able to offer with a view to a satisfactory solution of the problem.

5.2.5 Where the notifying administration resubmits the notice and the finding of the Board becomes favorable with respect to 5.2.1, the notice shall be treated as in 5.2.2.

5.2.6 If the notifying administration resubmits the notice without modification and insists on its reconsideration, and if the Board's finding with respect to 5.2.1 remains unfavorable, the notice is returned to the notifying administration in accordance with 5.2.4. In this case, the notifying administration undertakes not to bring the frequency assignment into use until the condition specified in 5.2.5 is fulfilled.

5.2.7 If a frequency assignment notified in advance of bringing into use in conformity with 5.1.3 has received a favorable finding by the Board with respect to the provisions of 5.2.1, it shall be entered provisionally in the Master Register with a special symbol in the Remarks Column indicating the provisional nature of that entry.

5.2.8 When the Board has received confirmation that the frequency assignment has been brought into use, the Board shall remove the symbol in the Master Register.

5.2.9 The date in Column 2c shall be the date of bringing into use notified by the administration concerned. It is given for information only.

5.3 Cancellation of entries in the Master Register

5.3.1 If an administration has not confirmed the bringing into use of a frequency assignment under 5.2.8, the Board will make inquiries of the administration not earlier than six months after the expiry of the period specified in 5.1.3. On receipt of the relevant information, the Board will either modify the date of coming into use or cancel the entry.

5.3.2 If the use of any recorded frequency assignment is permanently discontinued, the notifying administration shall so inform the Board within three months, whereupon the entry shall be removed from the Master Register.

ARTICLE 6

Miscellaneous Provisions Relating to the Procedure

Section I. Studies and Recommendations

6.1.1 If it is requested by any administration, the Board, using such means at its disposal as are appropriate in the circumstances, shall conduct a study of cases of alleged contravention or non-observance of these provisions, or of harmful interference.

6.1.2 The Board shall thereupon prepare and forward to the administrations concerned a report containing its findings and recommendations for the solution of the problem.

6.1.3 On receiving the Board's recommendations for the solution of the problem, an administration shall promptly acknowledge the receipt by telegram and shall subsequently indicate the action it intends to take. In cases when the Board's

suggestions or recommendations are unacceptable to the administrations concerned, further efforts should be made by the Board to find an acceptable solution to the problem.

6.1.4 In a case where, as a result of a study, the Board submits to one or more administrations suggestions or recommendations for the solution of a problem, and where no answer has been received from one or more of these administrations within a period of four months, the Board shall consider that the suggestions or recommendations concerned are unacceptable to the administrations which did not answer. If it was the requesting administration which failed to answer within this period, the Board shall close the study.

Section II. Miscellaneous Provisions

6.2.1 If it is requested by any administration, particularly by an administration of a country in need of special assistance, the Board, using such means at its disposal as are appropriate in the circumstances, shall render the following assistance:

a) computation necessary in the application of Annex 1 to this Appendix;

b) any other assistance of a technical nature for completion of the procedures in this Appendix.

6.2.2 In making a request to the Board under paragraph 6.2.1, the administration shall furnish the Board with the necessary information.

ARTICLE 7

The Plan

7.1 COLUMN HEADINGS OF THE PLAN

Col. 1 Country symbol.

Col. 2 Predetermined arc.

Col. 3 Frequency band.

Col. 4 Service area.

ARTICLE 8

Interference

8.1 The Members of the Union shall endeavor to agree on the action required to reduce harmful interference which might be caused by the application of these provisions and the associated Plan.

8.2 As regards considerations of sharing between the fixed-satellite service and the other services to which the bands involved in this Plan are allocated the provisions of Nos. 2501-2503, 2505-2510, 2539-2541, 2543-2544, 2546-2547, 2549-2550, 2565-2572, 2615-2619, 2628-2630, and 2636 in Articles 27, 28 and 29 of the Radio Regulations shall apply, as appropriate, in each case.

ARTICLE 9

Period of Validity of the Provisions and Associated Plan

9.1 The provisions and associated Plan have been prepared in order to meet the requirements of the fixed-satellite service in the bands concerned for a period of at least 10 years.

9.2 In any event, the provisions and associated Plan shall remain in force until their revision by a competent administrative radio conference convened in accordance with the relevant provisions of the Convention in force.

Reason: These provisions are necessary to establish and administer the Allotment Plan.

Agenda Item 2: Improved regulatory procedures for the Fixed-Satellite Service in certain portions of the 6/4 GHz, 14/11-12 GHz and 30/20 GHz bands.

At WARC-ORB-85, some administrations expressed the belief that the current regulatory procedures may inhibit equitable access to the geostationary satellite orbit. To address these concerns, during the nearly three years since the conclusion of the First Session, the USA has evaluated possible regulatory changes to effect the planning method described as "improved procedures." These possible changes are designed to achieve the overall aim of allowing equitable access to the GSO in the relevant frequency bands, providing administrations with the assurance that they can operate satellite systems successfully. One component of this review has been our experience in coordinating satellite system. This experience has illustrated that each satellite network presents unique requirements and interests that need to be satisfied. These requirements may change during the operational lifetime of the satellite network in order to meet the changing telecommunications needs of the administrations. Administrations that are using or seeking to use the GSO are trying to satisfy their individual telecommunications requirements. At the same time, they want to minimize the constraints necessary to avoid unacceptable interference to operational traffic.

We recognize that the coordination of satellite systems is a negotiation process. The process generally involves defining the requirements, interests and needs of each administration, describing the existing satellite environment and identifying potential mutual interference situations. Solutions are proposed, examined, modified and eventually accepted, as reasonable ways to avoid mutual interference. The end result of coordination is a balance of the interests and requirements of each administration. While some coordination problems are more complex than others, all coordinations require the cooperation and good will of the affected administrations. The USA, therefore, is proposing that certain modifications be made to Article 11 to clarify that administrations are to mutually resolve difficulties that may arise in obtaining equitable access to the geostationary-satellite orbit. Because these provisions would apply to all space services in all bands, except as provided for in the FSS allotment plan, the proposed modifications to Article 11 are presented under Agenda Item 4.

We further believe that administrations need regulatory flexibility if they are to respond to the unique circumstances of a particular coordination and reach agreement in a cooperative, timely and efficient manner. Article 11 does not currently prescribe the means by which coordination is to be

accomplished. When coordination requires meetings, these are frequently bilateral but can also involve more than two administrations simultaneously, e.g. multilateral. We believe this degree of flexibility should be maintained. Most coordination work, such as confirming a satellite system's technical parameters and analyzing the interference potential between satellite systems, is accomplished through written correspondence and telephone communication over a period of time. In addition, the more complex technical issues are addressed by engineering personnel at meetings lasting two to three days. After these meetings, the parties consult independently with their governments and operating entities concerning proposed solutions to accommodate the new or modified satellite network. Often, additional meetings and correspondence are needed before coordination agreements are reached. The time needed to complete coordination and the associated costs depend on both the number of administrations involved in the process and the complexity of the technical issues.

The USA recognizes that some administrations believe that the current regulatory procedures may inhibit equitable access to the geostationary orbit. We believe, however, that substantial changes to the Radio Regulations to include additional procedural mechanisms will add to the complexity of the coordination process without any clear improvement in access to the orbit. The administrative complexities inherent in a formal structured mechanism could cause delays in reaching coordination agreements and ultimately in implementing satellites. Further, a formal mechanism will impose additional, and often unnecessary, costs on administrations. There is no assurance that a formal process will be able to conclude arrangements for a satellite network in a timely manner consistent with the implementation schedules for a particular network. Consequently, we believe that administrations may be reluctant to commit funds for constructing satellite systems, if they view this regulatory process as adding significant risk to an already high risk venture.

For these reasons, the United States believes that implementation of a new formal mechanism may not facilitate the coordination of new or modified satellite networks using the GSO, especially if this mechanism results in additional unncessary costs or increases adminstrative delays. The USA, therefore, is proposing that WARC-ORB-88 adopt Resolution [X], so that the provisions of Articles 11 and 13 continue to be the normal means of achieving access to the GSO for the Fixed-Satellite Service in all frequency bands, except as provided for in the allotment plan.

In addition, the USA believes that the complexity of the coordination process would be lessened by certain changes to the technical criteria used to identify affected administrations. By increasing the threshold value used to identify affected administrations, the number of required coordinations would decrease. To this end, the USA is proposing that Appendix 29 be modified to increase the threshold value of delta T/T from 4% to 6% and that this new value be used for the Fixed-Satellite Service in all frequency bands, except as provided for in the FSS Allotment Plan. This subject is also treated under Agenda Item 4, and appropriate proposals to modify Appendix 29 are contained in that section.

USA/ /11 Finally, as discussed under Agenda Item 14, the USA proposes that the 30/20 GHz bands not be included in any planning method, including an "improved procedures" method, at this time.

USA/ /12 ADD

Resolution [X]

Relating to Improved Procedures for the Fixed-Satellite Service

The World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of Space Services Utilizing It, Geneva, 1988

considering

(a) that the concept of multilateral planning meetings as a mechanism to provide access to the Geostationary-Satellite Orbit (GSO)/spectrum resource in certain Fixed-Satellite Service frequency bands has been studied;

(b) that the Article 11 provisions have been modified to clarify that all affected administrations will be responsible for resolving any difficulties in the coordination of satellites;

(c) that the provisions of Article 11 currently permit multilateral consultations among affected administrations as a mechanism to achieve access to the GSO/spectrum resource for space radio services;

(d) that the CCIR is continuously studying and updating technical guidelines to facilitate the coordination of satellite networks;

(e) that changes in the regulatory procedures should avoid increased costs, additional administrative burdens and delays in implementing satellite networks;

recognizing

(1) that coordination is a process of negotiation among affected administrations having networks using or seeking to use the GSO;

(2) that the coordination of each network presents unique circumstances and requirements;

(3) that any detailed coordination requires the cooperation and good will of the affected administrations in order to reach a successful conclusion;

(4) that, at the conclusion of a coordination of a satellite system, a balance of interests of each affected administration is achieved;

(5) that undue delays in reaching agreement in the coordination process can affect the implementation of satellite systems;

emphasizing

that administrations need flexibility in the regulatory process to address unique circumstances and requirements within the coordination process in order to reach agreement in a cooperative, timely and efficient manner;

believing

that implementation of a formal mandatory multilateral planning meeting structure within the Radio Regulations would impede administrations' access to both the GSO and spectrum, and would place unacceptable administrative and financial burdens on the Union and its Membership;

resolves

that the provisions of Articles 11 and 13 continue to be the normal means of achieving access to the GSO for the Fixed-Satellite Services in all frequency bands, except as provided for in the Fixed-Satellite Service Allotment Plan.

Reason: To reaffirm that coordination can be conducted on a multilateral basis under the current Articles 11 and 13 procedures.

Agenda Item 3: Technical standards, parameters and criteria for the Fixed-Satellite Service in the frequency bands subject to planning.

The USA has identified several principles to guide the selection of technical standards, parameters and criteria for the Fixed-Satellite Service in the frequency bands subject to planning. We recognize that the geostationary-satellite orbit and frequency spectrum is a limited natural resource and that the technical standards adopted should permit efficient use of this resource. Because it is difficult to anticipate the technology that will be available at reasonable costs in the future, the technical characteristics that are adopted must permit the use of evolving technology. Also, because the Fixed-Satellite Service provides for a variety of services, it is essential that the technical standards adopted continue to facilitate the introduction of technology that permits a diversity of services for satellite users in the future.

With respect to improved regulatory procedures (see Agenda Item 2), the USA believes that the coordination of satellite systems under Article 11 would be eased by increasing the coordination threshold value of delta T/T from 4% to 6%. This change would decrease the number of required coordinations. Thus, the USA is proposing that Appendix 29 be modified to increase the delta T/T threshold value from 4% to 6%. Because this criteria would apply to all space services being coordinated under Article 11, the proposals are presented under Agenda Item 4.

In addition, certain technical parameters must be identified and adopted by the Conference for use in the development and implementation of the allotment plan. Further study is necessary before proposals can be presented. Accordingly, the USA is not proposing technical parameters for the allotment plan at this time.

Agenda Item 4: Regulatory procedures and technical characteristics for space services and frequency bands not to be subject to planning.

The current Radio Regulations pertaining to space services, which have operated without major changes since the SpaceWARC of 1971, have been responsive to the full range of administrations' requirements. All satellite systems now operating have been implemented as a result of successful application of procedures and technical standards prescribed by the Radio Regulations. However, in response to isolated problems which have been encountered, some of which were recognized by WARC-ORB-85, the USA submits to the Second Session proposals for certain changes that generally would apply to space services and frequency bands not subject to planning. The USA may identify the need for additional proposals regarding technical characteristics as it continues its Conference preparations.

Coordination Process

We recognize that successful coordination of satellite systems under Article 11 is a cooperative effort. All coordinations, regardless of the service or the frequency bands involved, require the cooperation and goodwill of the affected administrations in order to reach a successful conclusion. The USA, therefore, is proposing that certain modifications be made to Article 11 to clarify that administrations are to cooperate in mutually resolving any difficulties that may arise in accessing the geostationary-satellite orbit. These provisions would apply to all space services in all bands subject to the Article 11 procedures including the Fixed-Satellite Service (see Agenda Item 2), except as provided for in the FSS allotment plan.

Network Coordination/Notification

According to IFRB Circular-letter No. 654, as of April 1986 the Board was faced with processing many earth station frequency assignment notices. Most of these assignments were not originally associated with a coordination request, pursuant to No. 1060 of the Radio Regulations, for the network of which they are a part. Consequently, they would generally require the publication of a special section pursuant to the provisions of No. 1060. The Board took action to provisionally register the assignments on the assumption that the characteristics of these earth stations were taken into account in any coordination agreement for the involved networks. The provisional nature of

the entries for these assignments would individually be removed after six months if the Board did not receive an objection regarding that particular assignment within that time period.

The USA supports the action taken by the Board in that it appears that protection from interference for all stations concerned is not diminished. Considerable savings in publication and other processing costs result. These savings apply not only to the Board's budget but directly and indirectly to all ITU administrations.

Accordingly, the USA has reviewed the provisions of Articles 11 and 13 with the objective of proposing revisions which will incorporate the present practice and will otherwise decrease the procedural complexity without diminishing the protection presently enjoyed under the Radio Regulations.

USA/ /13 To this end, the USA proposes that all coordination between geostationary satellite networks under the provisions of No. 1060 should be on the basis of typical earth stations within an associated service area, and that the notification of assignments for a network should be on the basis of the space station and typical earth stations.

The notification of the characteristics of a satellite network including the typical earth stations used in the coordination procedure pursuant to No. 1060 should be performed by the administration responsible for the space station.

New earth stations whose characteristics were not included in the original or subsequent coordination agreements should also be coordinated and notified on the basis of typical earth station characteristics by the administration responsible for the space station.

With respect to coordination of earth stations pursuant to the provisions of No. 1107 of the Radio Regulations, no change is proposed that would alter the present procedures for securing the requisite protection for both earth stations and the terrestrial services. We do, however, suggest that the basic characteristics of earth stations, required to be submitted for this coordination procedure and subsequent notification, be reviewed. No change is proposed as to the administration responsible for the coordination and notification.

The USA is proposing that the Board's examination of notifications be revised so that under the provisions of No. 1504, examination is made only with respect to satellite network assignments including associated typical earth stations, while under the provisions of No. 1505, examination is made only with

respect to individual earth stations notified due to the applicability of the provisions of No. 1107.

It is our understanding that the Board maintains two files of registered assignments. One contains terrestrial assignments and the other contains space assignments. They are merged to create the International Frequency List (IFL). The information contained in the IFL on space service assignments may be better utilized if it were presented separately. Consequently, the USA

USA/ / 14 proposes that the IFL be published in two sections. The first section would contain all terrestrial services and radio astronomy, and the second section would contain all space services. The USA further proposes that the second section be

USA/ / 15 divided into at least three sub-sections. The first would contain information on geostationary satellite networks, the second would contain information on non-geostationary satellite networks and deep space assignments, and the third section would contain information on the earth stations notified due to the applicability of the provisions of No. 1107. It is suggested that the information in the first two sections be presented in a format similar to that of an AR11/C special section. The third section would be in the present format. As an additional budgetary benefit, adoption of this format could negate the need to publish List VIIIA.

Article 14

The Article 14 procedures of the Radio Regulations are applied where a footnote in the Table of Frequency Allocations requires an agreement with an administration. Certain U.S. entities have experienced difficulty in effecting the necessary agreements in two distinct types of cases. The USA, therefore, is proposing certain modifications to Article 14 to improve each of these situations:

(a) when administrations responding under No. 1617 have failed to provide at least basic characteristics of their stations whose services might be affected, or have delayed long beyond the recommended period of four months for providing such characteristics, or have failed altogether to provide such characteristics while still withholding agreement; and,

(b) when earth station agreements are required (particularly when mobile or transportable earth stations are involved), administrations are faced with having to comply twice with coordination procedures -- once in effecting an agreement under the provisions of Article 14 and again in a normal Article 11 coordination.

Appendix 28

The USA supports certain modifications to Appendix 28 regarding space research systems and meteorological satellite earth stations.

a. Space Research Systems

In 1986 the CCIR adopted a recommendation for new interference criteria for space research systems. The recommended values, which are less conservative than the current values by 4 dB, result in slightly shorter coordination distances. The USA supports the use of these CCIR recommended values and is proposing that Table II of Appendix 28 be modified to incorporate these criteria.

In addition, the proposed protection criteria as presented in Table II distinguish between manned and unmanned requirements. Because protection from interference power levels is allowed for a longer time for unmanned activities, the coordination contour data is separated. Finally, because signal characteristics and earth station design for the Space Operation Service and the Space Research Service are similar, the same value for both services is shown in the proposed Appendix 28 changes.

b. Meteorological Satellite Earth Stations

Appendix 28 provides methods for preparing contours to be used in coordinating satellite earth terminals with terrestrial systems. Table II of this Appendix lists parameters, typical of such terminals in various frequency bands, which determine the size of the appropriate coordination contour. For certain bands, data was not available when Table II was prepared and the corresponding entries are blank. This is addressed in Footnote 1 to the table as follows: "Parameters associated with these services may vary over a rather wide range. Further study is required before representative values become available."

The lack of appropriate coordination criteria has created confusion among the operators of METSAT receivers in the bands 1670-1700 and 1700-1790 MHz, as well as among parties wishing to oeprate in other services which may be authorized in these bands. The USA is proposing modifications to Appendix 28, Table II to reflect recent work in this area.

These proposed values are based on meteorological systems operating with low earth orbit satellites currently using the band. Values for geostationary systems have yet to be determined. Values are supplied for two types of earth stations

commonly employed in this band, a large diameter (26 meter) parabolic antenna receiving real-time and recorded data, and a smaller (3 meter) antenna involved in real-time data reception only. The interference susceptibility of these two station types differ, thus separate parameters are provided for each.

Appendix 29

The concept of delta T/T to be used as a regulatory mechanism was developed and incorporated into the Radio Regulations at the 1971 WARC-ST. Its purpose was to provide a threshold value for identifying the need for coordination among co-channel geostationary satellite systems. Although originally devised for the Fixed-Satellite Service, the delta T/T mechanism also has been used for other space services.

The appropriate level for the delta T/T threshold value is related to assumptions concerning the level of single entry interference to the total interference allowed for co-frequency satellite networks and services in a satellite system design. Although the satellite system environments differ among the different space services, we believe that a single coordination threshold value of delta T/T of 6% can be used by all services to insure that coordination is required when significant interference may exist. This increase from the current threshold value of 4% will generally reduce the number of coordinations required, including in the Fixed-Satellite Service (see Agenda Item 2).

Thus, the USA is proposing that Appendix 29 be modified to increase the delta T/T threshold value from 4% to 6%.

ARTICLE 8

Frequency Allocations

Section IV. Table of Frequency Allocations

USA/ /16 (MOD) 884 In the band 31 - 31.3 GHz the power flux-density limits specified in No. 2542 2582 shall apply to the space research service.

Reason: To correct a typographical error in the provision, noting that No. 2542 does not specify a power flux-density limit.

ARTICLE 11

Coordination of Frequency Assignments to Stations in a Space Radiocommunication Service Except Stations in the Broadcasting-Satellite Service and to Appropriate Terrestrial Stations[1]

Section I. Procedures for the Advance Publication of Information on Planned Satellite Networks[2]

USA/ /17 MOD 1049

§3. (1) An administration receiving comments sent in accordance with No. 1047 and administrations sending such comments shall endeavor to resolve any difficulties that may arise and shall provide any additional information that may be available.

Reason: To further elaborate the burden sharing provisions of the Radio Regulations.

USA/ /18 MOD 1050

(2) In case of difficulties arising when any planned satellite network of a system is intended to use the geostationary-satellite orbit, and taking into account the relevant CCIR Recommendations:

Reason: To facilitate the resolution of difficulties.

USA/ /19 MOD 1051

a) the administration responsible for the planned system shall first explore all possible means of meeting its requirements, taking into account the characteristics of the geostationary-satellite networks of other systems, and without considering the possibility of adjustment to systems of other administrations. If no such means can be found, the administration concerned is then free to apply to other administrations concerned individually or collectively in order to mutually resolve ~~solve~~ these difficulties;

Reason: Consequential to MOD 1049.

USA/ /20 (MOD) 1053 c) if after following the procedure outlined in Nos. MOD 1051 and 1052 there are unresolved difficulties, the administrations concerned shall together make every possible effort to resolve these difficulties by means of mutually acceptable adjustments, for example, to geostationary space station locations and to other characteristics of the systems involved in order to provide for the normal operation of both the planned and existing systems.

Reason: Consequential to MOD 1049.

USA/ /21 MOD 1054 (3) In their attempts to resolve the difficulties mentioned above, administrations may seek the assistance of the Board, to aid in:

USA/ /22 ADD 1054A a) evaluating the levels of interference;

USA/ /23 ADD 1054B b) defining, with the agreement of the administrations concerned, the technical criteria to be used;

USA/ /24 ADD 1054C c) making administrative arrangements to facilitate joint discussions as mutually agreed by the administrations concerned.

Reason: Consequential to MOD 1049.

USA/ /25 MOD

Section II. Coordination of Frequency Assignments to a Space Station on a Geostationary Satellite ~~or an~~ and Earth Stations Communicating with Such a Space Station in Relation to Stations of Other Geostationary-Satellite Networks

USA/ / 26 MOD 1060

§6. (1) Before an administration[1] (or, ~~in the case of a space station,~~ one acting on behalf of a group of named administrations) notifies to the Board or brings into use any frequency assignment to a space station on a geostationary satellite or to an earth station that is to communicate with a space station on a geostationary satellite, it shall, except in the cases described in Nos. 1066 to 1071, effect coordination of the assignment with any other administration whose assignment, for a space station on a geostationary satellite or for an earth station that communicates with a space station on a geostationary satellite, might be affected.

Reason: To implement the network coordination/notification concept.

USA/ / 27 ADD 1060.1

[1]The administration responsible for the space station shall also be responsible for performing the coordination for earth stations associated with the space station pursuant to the provisions of this section.

Reason: To reduce the amount of unproductive paperwork in the network-to-network coordination process, while retaining each administration's full sovereignty in the process, it is in keeping with the Board's comments if the administration responsible for the space station also coordinates the communicating earth stations. This implements the network coordination/notification concept.

USA/ /28 MOD 1069

c) when an administration proposes to notify or bring into use a new earth station within a service area of an existing satellite network, provided that the new earth station would not cause interference of a level greater than that which would be caused by an earth station pertaining to the same satellite network and whose network characteristics including typical earth stations with their service area have been published, ~~together with the information concerning the space station,~~ in accordance with No. 1078 or notified to the Board without coordination in those cases where Nos. 1066 to 1071 apply in which case the Form of Notice shall be suitably annotated.

Reason: This will provide for the simplification without loss of protection inherent in using typical earth station parameters, as well as eliminating the number of perfunctory checks required of the Board's Specialized Secretariat. Also consequential to MOD 1060.

USA/ /29 MOD 1073

§7. (1) For the purpose of effecting coordination, the administration requesting coordination shall send to any other administration concerned under No. 1060 all the information listed in Section B of MOD Appendix 3 required for the coordination including associated typical earth stations and their service area. The request concerning coordination of a network ~~space station or an associated earth station~~ may specify all or some of the frequency assignments expected to be used by that satellite network ~~space station, but thereafter each assignment shall be dealt with individually~~.

Reason: Consequential to MOD 1060.

USA/ /30 ADD 1085A

(3) Affected administrations as well as the administration seeking coordination shall mutually resolve any difficulties.

Reason: To make more explicit that all administrations involved are required to fully cooperate in mutually resolving any incompatibilities between networks identified during coordination.

ARTICLE 13

Notification and Recording in the Master International Frequency Register of Frequency Assignments[1] to Radio Astronomy and Space Radiocommunication Stations Except Stations in the Broadcasting-Satellite Service[2]

Section I. Notification of Frequency Assignments

USA/ /31 MOD 1488 §1. (1) Any frequency assignment[1] to be used for transmission or reception by an earth[2] or space station shall be notified to the Board:

Reason: Explanatory footnotes provided.

USA/ /32 ADD 1488.1 [1]The administration responsible for the coordination pursuant to the provisions of No. 1060 shall also be responsible for the notification of the earth station characteristics of a satellite network.

Reason: Part of a series of proposals to implement the network coordination/notification principle.

USA/ /33 ADD 1488.2 [2]The notification of typical earth station characteristics including their associated service area is sufficient to satisfy the requirements of this Article, including Nos. 1489, 1490 and 1491, with respect to other space radiocommunication services.

Reason: Consequential to ADD 1488.1.

USA/ /34 MOD 1494 (4) A notice of an assignment not requiring coordination pursuant to No. 1107 and submitted in accordance with Nos. 1488 to 1491 and relating to a frequency assignment to ~~mobile~~ any earth stations in a satellite system shall be on the basis of typical earth stations, including an indication of their service area. ~~include the technical characteristics either of each mobile earth station, or of a typical mobile earth station, and an indication of the service area within which these stations are to be operated.~~

Reason: Consequential to ADD 1488.1. In particular, for an earth station assignment not requiring coordination with the terrestrial services of another administration, the ability to notify typical earth stations provides the procedural benefits presently available through their use in the network-to-network coordination phase.

USA/ /35 MOD 1504 b) for a notice of a geostationary satellite network including only its typical earth stations, with respect to its conformity with the provisions relating to the coordination of the use of the frequency assignment with the other administrations concerned, vis-à-vis space radiocommunication stations in cases where the provisions of Nos. 1060 or 1066 to 1071 are applicable;

Reason: Consequential to ADD 1488.1. Also to clarify that this examination is to be performed only on notices prepared in accordance with Section B of revised Appendix 3.

USA/ /36 MOD 1505 c) for a non-typical earth station, with respect to its conformity with the provisions relating to the coordination of the use of the frequency assignment with the other administrations concerned, vis-à-vis terrestrial radiocommunication stations in cases where the provisions of No. 1107 are applicable;

Reason: Consequential to ADD 1488.1. Also to clarify that this examination is to be performed only on notices prepared in accordance with Section D of revised Appendix 3.

ARTICLE 14

USA/ /37 NOC

Supplementary Procedure to Be Applied in Cases Where a Footnote in the Table of Frequency Allocations Requires an Agreement with an Administration

USA/ /38 MOD 1610

(1) Before an administration (or one acting on behalf of a group of named administrations) notifies to the Board a frequency assignment in accordance with any footnote in the Table of Frequency Allocations which makes reference to this Article, it shall obtain the agreement of any other administration whose services may be affected. In the case of a footnote concerning a space radiocommunication service, this procedure may be initiated before or at the same time as the application of the provisions of Article 11.

Reason: To make clear that an administration may act on behalf of a group of named administrations in securing Article 14 agreement.

USA/ /39 ADD 1610A

(1A) In the case of a footnote concerning a space radiocommunication service, agreement under this Article to frequency assignments of a proposed geostationary-satellite network shall not be required from other administrations with respect to their geostationary-satellite networks.

Reason: Only Article 11 should apply to coordination between geostationary-satellite networks.

USA/ /40 ADD 1610B

(1B) In the case of earth station assignments, an administration having successfully completed the procedure of this Article will be regarded as having successfully completed the procedure of Article 11, Section III.

Reason: The provisions of Article 11, Section III also apply to earth stations. It is redundant to coordinate earth station frequency assignments pursuant to Article 11 after having successfully completed the Article 14 procedure for those earth stations.

USA/ /41 MOD 1613.1

[1]The information in Appendix 3 or 4 submitted to the Board under Article 11 may also be used for the purpose of this procedure. The information submitted shall be sufficiently detailed to permit the application of Article 14 for the planned assignment to a satellite network.

Reason: To clarify the need for the specific information required.

USA/ /42 MOD 1616

(2) The Board shall endeavour to identify administrations whose services may be affected, and shall include the names of those administrations it is able to identify in the special section of its weekly circular and in the circular telegram mentioned under No. 1615[1,2].

Reason: Consequential to ADD 1616.1 and 1616.2.

USA/ /43 ADD 1616.1

[1]As regards earth station coordination with terrestrial stations, the method described in Appendix 28 will serve to identify the administrations whose agreement is necessary in the bands between 1 and 40 GHz which are shared between space radiocommunication services and terrestrial radiocommunication services.

Reason: To ensure that the method of Appendix 28, which is directly applicable, is used in this case.

USA/ /44 ADD 1616.2

[2]Observance of the power flux-density limits of Article 28, where specified for a given band, precludes the requirement for further coordination according to Article 14 in the case of links where terrestrial services may be affected by a transmitting space station.

Reason: The PFD limits were specified at levels sufficient to protect the terrestrial services. Observance of the PFD limits should obviate the need for further coordination.

USA/ /45 MOD 1617

3. (1) ~~Any administration, upon receipt of this information and believing that the planned assignment may affect its services~~ On receipt of this request for agreement, an administration shall examine the matter with respect to service rendered by its radiocommunication stations operating in accordance with the Table of Frequency Allocations or ~~planned to be so operated, shall,~~ to be so operated within the next five years. If this examination reveals potential adverse effects, then within four months of the date of the relevant weekly circular, the administration shall so inform both the administration requesting agreement and the Board.

Reason: Basically, to set a time limit for taking into account planned assignments.

USA/ /46 MOD 1618

(2) Any administration not having commented within the period of four months specified in No. 1617 shall be regarded as unaffected by the planned assignment.

Reason: To clarify the length of the period.

USA/ /47 MOD 1619

(3) Any administration responding under No. 1617 to a request for agreement and which cannot give its agreement to the request shall, ~~if possible at the same time,~~ give at least the relevant basic characteristics[1] of its stations whose services may be affected, and shall make such suggestions as it may be able to offer with a view to a satisfactory solution of the problem. A copy of all this information shall simultaneously be sent to the Board.

Reason: To require administrations to provide the relevant basic characteristics of its affected stations at the same time it sends its disagreement to the administration requesting agreement. Also to add the footnote.

USA/ /48 ADD 1619.1

[1]Characteristics of stations in terrestrial services shall be in accordance with Appendix 1, and characteristics of stations in space services shall be in accordance with Appendix 3 or 4.

Reason: To specify the form of the basic characteristics required.

USA/ /49 ADD 1619A

(3A) If an administration seeking agreement of a receiving assignment is willing to accept interference from assignments of an affected administration based on relevant basic characteristics provided by the affected administration, notification of this acceptance shall constitute an agreement.

Reason: To avoid an impasse between administrations when an administration fails to give its agreement if the requesting administration accepts interference.

USA/ /50 ADD 1619B

(3B) If the administration which cannot give its agreement to the request does not provide the basic characteristics of its affected stations within the period of four months specified in No. 1617, the administration requesting agreement may request the Board to endeavor to obtain the characteristics.

USA/ /51 ADD 1619C (3C) Where the Board receives a request under No. **1619B**, it shall forthwith send a telegram to the administration concerned requesting the relevant basic characteristics.

USA/ /52 ADD 1619D (3D) When an administration fails to provide the characteristics of its affected stations within three months of dispatch of the Board's telegram of request under No. **1619C**, it shall be deemed that the administration agrees to the request.

Reason: (For Nos. 1619B, C, and D) Article 14 is open ended if an administration does not provide the relevant basic characteristics of its affected stations.

USA/ /53 MOD 1624 8. An administration having sought agreement under Nos. **1611** to **1613** and having received <u>either</u> no response <u>or only responses of agreement</u> under No. **1617** from any administration shall<u>, on the expiry of the period of four months following the date of the relevant weekly circular mentioned in No. **1615**,</u> inform the Board thereof and shall then be regarded as having successfully completed the procedure of this Article.

Reason: To include instances when administrations send their agreements and to clarify when a report on the results of the Article 14 procedure should be made.

USA/ /54 ADD 1624A 8A. An administration having sought agreement under Nos. **1611** to **1613** and having received one or more responses of disagreement under No. **1617** shall, on the expiry of the period of four months following the date of the relevant weekly circular mentioned in No. **1615**, inform the Board of the disagreement, the progress made in reaching agreement, or of any difficulties. Such communication shall be made, as necessary, to the Board every six months after the above mentioned period.

Reason: The IFRB has requested reports on the Article 14 procedure when the U.S. was still in the process of resolving the problems. RR1624A would clarify the providing of reports prior to the resolution of problems.

USA/ /55 MOD 1625 9. An administration having sought agreement under Nos. 1611 to 1613, having received one or more responses of disagreement under No. 1617, and having informed the Board under No. 1623 of the resolution of the problem, shall be regarded as having obtained agreement in accordance with the relevant footnote in the Table of Frequency Allocations.

Reason: To clarify that this regulation pertains to the situation when a disagreement is initially given.

USA/ /56 MOD 1626 10. The Board, following receipt of advice under Nos. 1624, 1624A, or 1625 as to the completion of this procedure, shall publish this information in the appropriate special section of the weekly circular.

Reason: Consequential to ADD 1624A.

USA/ /57 It is proposed that Forms of Notice not be incorporated in the Radio Regulations. To preserve flexibility, the Conference should leave to the Board the matter of preparing Forms of Notice after it rises, as did the 1979 WARC.

USA/ /58 In keeping with our Network Notification/Coordination proposal, but not wanting to freeze the Forms of Notice to 1988 circumstances, we propose that the Conference guide the Board as outlined below.

APPENDIX 3

Listed below are some proposed suggestions:

1. Revise Appendix 3 into the following sections:

   A. General Information
   B. Geostationary Satellite Network
   C. Non-Geostationary and Deep Space Satellite Networks
   D. Earth Station (non-typical - when RR1107 coordination is required)
   E. Radio Astronomy Station

Specific proposals to amend Appendix 3 will be forthcoming.

2. The coordination/notification forms should be designed by the Board with a modular concept in mind and any one page should not be larger than A4 (approximately 8¼ inch by 11 inch) page size. This is necessary to facilitate the legibility of information, the reproduction of completed forms, and their distribution to administrations concerned.

3. The item numbers in Appendix 3 should indicate the item number for that data that is used in the International Frequency List. For example, currently item 8b of Section B and item 9b of Section D call for the total peak envelope power and the maximum power density. These items are then indicated as 8b1 and 8b2 on the AP3/B form and 9b1 and 9b2 on the AP3/D form. The items are then listed in the International Frequency List under 8A (for items 8b1 and 9b1) and 8C (for items 8b2 and 9b2). Consequently, while it may be convenient to number items consecutively in the various sections of Appendix 3, that number should be followed by the item number of the column in the IFL. For example:

Item 8b (IFL 8A)

4. Space and terrestrial radiocommunication assignments should not be commingled in any Part of the Weekly IFRB Circular.

5. Listed below are the characteristics suggested for Section B (geostationary) of Appendix 3:

Administrative Information

PAGE __ OF __
DATE:
A: Notifying Administration _____
B: Administration Serial No. _____
15: Operating Administration or Company/
Postal and Telegraphic Addresses
C: First Notification _____
D: Resubmission _____
E1: Notification __
E2: Request for Coordination (RR1060) _____
E3: Request for Agreement (Art. 14) _____
E4: Request for Assistance of IFRB _____
F: Notification intended for:
F1: ADD __
F2: MOD __ ID No. _____
F3: SUP __ ID No. _____

Nature of Spacecraft:
Manned _____ Unmanned _____

Characteristics of the Network

4A: Name of the Network _____
G: Special Section Reference (RR1042)_____
H: Special Section Reference (RR1060)_____
[3b: Period of Validity _____]
[12: Regular Hours of Operation _____]
3a: Date of Bringing Into Use _____
5a1: Nominal Orbital Longitude _____
5a2: Longitudinal Tolerance _____
5a3: Inclination Excursion _____
5a4: Visibility Arc _____
5a5: Service Arc _____
(5a3): Difference SVC<VIS ARC _____

Characteristics of the Satellite Beam (Earth-to-Space)

ID Extension No. _____
4c: Receiving Satellite Beam Name _____
10d: Pointing Accuracy _____
9c: Polarization _____

Characteristics of Space Station Receive

1: Assigned frequencies _____
2: Assigned frequency band _____
7a: Class of Station _____
[7b: Nature of Service _____]
[7c: Experimental Station _____]
6: Service Area _____
9a: Gain (SSR) _____
9a: Gain Contours _____
10E: Radiation Diagram Versus Geostationary Orbit
8a: Emission(s) _____
10: Receiving System Noise Temperature _____

Characteristics of Earth Station Transmit

Earth Station ID Extension No. _____[1]
4: Service Area _____[2]
6A: Class of Station _____
9a: Antenna Gain (EST) _____
9b: Beamwidth _____
9c: Radiation Pattern _____
7a: Emission(s) _____
8b1: Total Peak Power _____
8b2: Maximum Power Density _____

---

[1]One is needed for each "class" or "standard" earth station in the network.

[2]This information is to be supplied only when different from 6 above.

Characteristics of the Satellite Beam (Space-to-Earth)

ID Extension No. _____
4c: Satellite Beam Name _____
10d: Pointing Accuracy _____
10c: Polarization _____

Characteristics of Space Station Transmit

1: Assigned frequencies _____
2: Assigned frequency band _____
7a: Class of Station _____
[7b: Nature of Service _____]
[7c: Experimental Station _____]
6: Service Area _____
10: Gain _____
10a: Antenna Gain Contours _____
10e: Radiation Diagram Versus Geostationary Orbit
8a: Emission(s) _____
9b1: Total Peak Power _____
9b2: Power Density _____

Characteristics of Earth Station Receive

Earth Station ID Extension No. _____[3]
4: Service Area _____[4]
6a: Class of Station _____
8a: Antenna Gain _____
8b: Beamwidth _____
8c: Radiation Pattern _____
9a: Receiving System Noise Temperature _____
7a: Emission(s) _____
9b: Link Noise Temperature _____
9c: Transmission Gain _____

(Note: Characteristics listed above are the minimum now required to enter the coordination phase. All should be reviewed. To make the above applicable to all bands but to indicate when a characteristic is not deemed necessary for a given band, a footnote system may be appropriate.)

6. Listed below are the characteristics suggested for Section C (non-geostationary) of Appendix 3:

---

[3]One is needed for each "class" or "standard" earth station in the network.

[4]This information is to be supplied only when different from 6 above.

Administrative Information

PAGE __ OF __
DATE:
A: Notifying Administration _____
B: Administration Serial No. _____
15: Operating Administration or Company/
Postal and Telegraphic Addresses
C: First Notification __
D: Resubmission __
E1: Notification __
E3: Request for Agreement (Art. 14) __
E4: Request for Assistance of IFRB __
F: Notification intended for:
F1: ADD __
F2: MOD __ ID No. _____
F3: SUP __ ID No. _____

Nature of Spacecraft:
Manned _____ Unmanned _____

Characteristics of the Network

4A: Name of the Network _____
G: Special Section Reference (RR1042) _____
[12: Regular Hours of Operation _____]
[3a: Date of Bringing Into Use _____]
5b1: Inclination Angle _____
5b2: Period _____
5b3: Apogee _____
5b4: Perigee _____
5b5: Reference body _____
5b6: Number of satellites _____

Characteristics of the Satellite [Beam] (Earth-to-Space)

ID Extension No. _____
[4c: Receiving Satellite Beam Name _____]
[10d: Pointing Accuracy ____]

Characteristics of Space Station Receive

1: Assigned frequencies _____
2: Assigned frequency band _____
7a: Class of Station _____
[7b: Nature of Service _____]
[7c: Experimental Station _____]
6: Service Area _____
9a: Gain (SSR) _____
9b: Radiation pattern _____
8a: Emission(s) _____
10: Receiving System Noise Temperature _____

Characteristics of Earth Station Transmit

Earth Station ID Extension No. _____[5]
4: Service Area _____[6]
6A: Class of Station _____
9a: Antenna Gain (EST) _____
9b: Beamwidth _____
9c: Radiation Pattern _____
7a: Emission(s) _____
8b1: Total Peak Power _____
8b2: Maximum Power Density _____

---

[5]One is needed for each "class" or "standard" earth station in the network.

[6]This information is to be supplied only when different from 6 above.

Characteristics of the Satellite [Beam] (Space-to-Earth)

ID Extension No. _____
[4c: Satellite Beam Name _____]
[10d: Pointing Accuracy _____]

Characteristics of Space Station Transmit

1: Assigned frequencies _____
2: Assigned frequency band _____
7a: Class of Station _____
[7b: Nature of Service _____]
[7c: Experimental Station _____]
6: Service Area _____
10: Gain _____
10b: Radiation pattern _____
8a: Emission(s) _____
9b1: Total Peak Power _____
9b2: Power Density _____

Characteristics of Earth Station Receive

Earth Station ID Extension No. _____[7]
4: Service Area _____[8]
6a: Class of Station _____
8a: Antenna Gain _____
8b: Beamwidth _____
8c: Radiation Pattern _____
9a: Receiving System Noise Temperature _____
7a: Emission(s) _____

---

[7]One is needed for each "class" or "standard" earth station in the network.

[8]This information is to be supplied only when different from 6 above.

7. Listed below are the characteristics suggested for Section D (non-typical, and RR 1107 required) of Appendix 3:

Characteristics of the Earth Station

Administrative Information

PAGE __ OF __
DATE:
A: Notifying Administration ___
B: Administration Serial No. _____
15: Operating Administration or Company/
Postal and Telegraphic Addresses
C: First Notification __
D: Resubmission __
E1: Notification __
E2: Request for Coordination (RR1107) __
E3: Request for Agreement (Art. 14) __
E4: Request for Assistance of IFRB __
F: Notification intended for:
F1: ADD __
F2: MOD __ ID No. _____
F3: SUP __ ID No. _____

4a: Name of earth station _____
4b. Country _____
4c. Geographical coordinates _____
6A: Class of Station _____
G: Special Section Reference (RR1042)_____
H: Special Section Reference (RR1060)_____
[12: Regular Hours of Operation _____]
[3a: Date of Bringing Into Use _____]
9d/8d: Horizon elevation diagram _____

Characteristics of Earth Station Transmit

1: Assigned frequencies _____
2: Assigned frequency band _____
9a: Antenna Gain (EST) _____
9b: Beamwidth _____
9e: Elevation angle _____
9f: Operating azimuthal angles _____
9h: Altitude _____
9c: Radiation Pattern _____
7a: Emission(s) _____
8b1: Total Peak Power _____
8b2: Maximum Power Density _____
9g: Polarization _____

Characteristics of Earth Station Receive

1: Assigned frequencies _____
2: Assigned frequency band _____
8a: Antenna Gain _____
8b: Beamwidth _____
8e: Elevation angle _____
8f: Operating azimuthal angles _____
8h: Altitude _____
8c: Radiation Pattern _____
9a: Receiving System Noise Temperature _____
7a: Emission(s)
9b: Link Noise Temperature _____
9c: Transmission Gain _____
8h: Polarization _____

Method for the Determination of the Coordination Area Around an Earth Station in Frequency Bands Between 1 GHz and 40 GHz Shared Between Space and Terrestrial Radiocommunication Services

TABLE II

Parameters Required for the Determination of Coordination Distance for a Receiving Earth Station

Space Radiocommunication Service Designation		Band 9 SUP: Space Research		Band 9 ADD: Space Research			Band 10 SUP: Space Research		Band 10 ADD: Space Research	
		Near Earth	Deep Space Manned	Near Earth Unmanned; Space Opers	Near Earth Manned	Deep Space	Near Earth	Deep Space	Near Earth	Deep Space
Frequency Bands (GHz)		1.700-1.710 2.290-2.300		1.700-1.710 2.200-2.290	2.200-2.290	2.290-2.300	8400-8500		8450-8500	8400-8450
Modulation at Earth Station (2)		-	-	-	-	-	-	-	-	-
Interference Parameters and Criteria	p0 (%)	0.1	0.001	0.1	0.001	0.001	0.1	0.001	0.1	0.001
	n	2	1	1 (9)	1	1	2	1	2	1
	p (%)	0.05	0.001	0.1 (9)	0.001	0.001	0.05	0.001	0.05	0.001
	J (dB)	-	-	-	-	-	-	-	-	-
	M0 (p0) (dB)	-	-	-	-	-	-	-	-	-
	W (dB)	-	-	-	-	-	-	-	-	-
Terrestrial Station Parameters	E (dBW) in B (8)	62(4)(6)	62(4)(6)	62(4)(6)	62(4)(6)	62(4)(6)	25 (4)	25 (4)	25 (4)	25 (4)
	Pt (dBW) in B	10(4)(6)	10(4)(6)	10(4)(6)	10(4)(6)	10(4)(6)	-17 (4)	-17 (4)	-17 (4)	-17 (4)
	Δ G (dB)	10 (6)	10 (6)	10 (6)	10 (6)	10 (6)	0	0	0	0
Reference Bandwidth (7)	B (Hz)	1	1	1	1	1	1	1	1	1
Permissible Interference Power	Pr (p) (dBW) in B	-220	-222	-216	-216	-222	-220	-220	-216	-220

(9) n is taken to be 1 for earth station supporting low orbit satellites. For earth stations supporting geostationary satellites, n takes on a value of 2 and p becomes 0.05.

REASON:

To revise values in Table II to reflect the latest interference criteria as published in CCIR Report 985 and Recommendation 609. Signal characteristics and earth station design for the Space Operation Service and the Space Research Service are similar and thus the same values for both services are reflected in the proposed changes.

Appendix 28

Method for the Determination of the Coordinaton Area Around an Earth Station in Frequency Bands Between 1 GHz and 40 GHz Shared Between Space and Terrestrial Radiocommunication Services

TABLE II

Parameters Required for the Determination of Coordination Distances for a Receiving Earth Station

MOD

Space Radiocommunication Service Designation		Meteorological-Satellite (7)		Meteorological-Satellite	
Frequency Bands (GHz)		1.670-1.700 (9)		1.700-1.790 (9)	
		Small	Large	Small	Large
Modulation at Earth Station		N	N	N	N
Interference Parameters and Criteria	P_o (%)	0.012	0.012	0.012	0.012
	n	2	2	2	2
	p (%)	0.006	0.006	0.006	0.006
	J (dB)	-11	6	-11	6
	$M_o(P_o)$ (dB)	10	8	10	8
	W (dB)	0	0	0	0
Terrestrial Station Parameters	E (dBW) in B	55	55	92 (6)	92 (6)
	P_t (dBW) in B	13	13	40 (6)	40 (6)
	G (dB)	0	0	10 (6)	10 (6)
Reference Bandwidth	B (Hz)	10^6	10^6	10^6	10^6
Permissible Interference Power	P_r (p) (dBW) in B	--	--	--	--

MOD (1) Parameters associated with ~~these~~ this services may vary over a rather wide range. Further study is required before representative values become available.

ADD (9) Parameters are given for representative small (e.g. 3 m) and large (e.g. 26 m) aperture earth stations for service from satellites in low earth orbit. Parameters associated with geostationary systems may differ from these values, and may in any case vary over a broad range for different systems.

Reason - To provide representative values for Meteorological Satellite earth terminals in the bands 1.670 - 1.700 GHz and 1.700 - 1.790 GHz.

APPENDIX 29

Method of Calculation for Determining if Coordination is Required Between Geostationary-Satellite Networks Sharing the Same Frequency Bands

USA/ /61 MOD 3.1 Simple frequency-changing transponder on board the satellite

The calculated values of the delta T/T and delta T'/T', expressed as percentages, shall be compared with the threshold value of ≠ 6%.

USA/ /62 MOD 3.2 Cases requiring independent treatment of the up-link and the down-link

a) In the case of interference into only one link, the up-link or the down-link, the value of delta T_e/T_e or delta T_s/T_s, expressed as a percentage, shall be compared with the threshold value of ≠ 6%.

b) In the case of interference into both the up-link and the down-link, between which there is a change of modulation on board the satellite, the values of delta T_e/T_e or delta T_s/T_s, expressed as a percentage, shall be compared with the threshold value of ≠ 6%.

ANNEX IV

Example of an Application of Appendix 29

USA/ /63 MOD 4. Conclusion

In the example show, the percentage increase in equivalent satellite link noise temperature is 7.8%. Since it exceeds the threshold value of ≠ 6%, coordination between the two networks is required.

Reason: To increase the delta T/T threshold value for determining the need to coordinate commensurate with current experience and the latest CCIR recommendations in order to reduce the number of coordinations required.

Agenda Item 5: Definitions relating to space services.

The definition for "Deep Space" has been under study by the CCIR. At the XVIth Plenary Assembly of the CCIR (Dubrovnik 1986), a modified definition was adopted.

The USA is proposing that the definition of "Deep Space" in Article 1 of the Radio Regulations be changed to conform with the definition used by the CCIR, as follows:

ARTICLE 1

Terms and Definitions

USA/ /64 MOD 169 Deep Space: Space at distances from the Earth ~~approximately~~ equal to, or greater than, ~~the distance between the Earth and the Moon~~ 2×10^6 kilometers.

Reason: To conform with the definition adopted by the CCIR. This change will require spacecraft in highly elliptic earth orbits and those with halo orbits around the L1 and L2 LaGrangian points to use frequencies only in space research bands which are not restricted to deep space links.

Agenda Item 6: Broadcasting-Satellite Service feeder link plan for Regions 1 and 3 in the 14.5-14.8 GHz and 17.3-18.1 GHz bands.

With respect to the intersessional work of the CCIR, the USA considers that the JIWP-ORB-88 Report offers much useful information. As a participant in the development of the CCIR report, we note that the report reflects a considerable effort in consensus building among many parties, which augurs well for the outcome of this Conference. The work of the First Session and the CCIR report to this Conference in combination offer an excellent basis for feeder link planning for Regions 1 and 3.

In connection with the planning exercises conducted by the IFRB during the intersessional period, the USA submitted requirements for feeder links within the 17.3-18.1 GHz band for seven areas in Region 3 with assignments in the down link plan. We reaffirm these requirements, which need to be accommodated in the Plan to be adopted at this Conference.

The USA is proposing that the feeder link Plan be developed in the 17 GHz band. Because the acceptability of the Plan will depend in part on the associated provisions, we believe that they should provide the same degree of implementation flexibility as now provided in the downlink Plans in Appendix 30. Further, the USA supports the incorporation of the Plan and the associated provisions into Appendix 30A. In order to facilitate this action, the text of Appendix 30A should be employed as an initial working document at the Conference. This will organize the discussions in such a manner as to promote uniformity in the Radio Regulations for all Regions as well as to clearly identify any differences from the approach taken in Region 2.

The USA is also proposing changes to Annexes 1 and 4 of Appendix 30A to provide common, world-wide coordination threshold values, as proposed in section 5.2 of the Report of the CCIR JIWP/ORB(2). These proposed methods involve modifications to the Plan, the initiation of interim systems, and sharing within the Fixed-Satellite Service.

The USA proposes that the Conference take the following actions regarding development of a feeder link Plan for Regions 1 and 3:

USA/ /65

a. Construct a feeder link Plan for Regions 1 and 3 in the 17.3-18.1 GHz band that satisfies the requirements of all administrations. We believe that this band has enough

capacity to satisfy all feeder link requirements for all administrations. Further, use of this band will simplify the design of satellite systems.

USA/ /66 b. Adopt the technical characteristics that are contained in section 6.2 of the Report of the First Session and summarized in Table 6-7 of that section in developing the feeder link Plan. We endorse the recommendations of the First Session, as tempered by the Report of the CCIR JIWP/ORB(2), to base the feeder link Plan on a constant output power of the space station, not on automatic gain control.

USA/ /67 c. Employ the methods described in Chapter 6 of the Report of the First Session and Chapter 5 of the JIWP/ORB(2) Report to resolve incompatibilities in the feeder link Plan.

USA/ /68 d. Develop associated provisions for the Plan drawing upon the planning method, technical parameters and criteria given in Chapter 6 of the Report of the First Session and Chapter 5 of the JIWP/ORB(2) Report.

USA/ /69 e. Use the approaches of section 5.2 of the Report of the CCIR JIWP/ORB(2) to assess the mutual compatibility of the feeder link Plans of Region 2 and of Regions 1 and 3. These approaches include the use of a single entry C/I co-channel protection ratio of 41 dB for all Regions to be exceeded for all but 1% of the worst month and the protection ratio templates contained in the CCIR JIWP/ORB(2) Report.

USA/ /70SUP Title Appendix 30A

USA/ /71ADD

Appendix 30A

Provisions and Associated Plans for the Feeder Links
For the Broadcasting-Satellite Service
(11.7-12.2 GHz in Region 3, 11.7-12.5 GHz in Region 1
and 12.2-12.7 GHz in Region 2)
in the Frequency Band 17.3-18.1 GHz

ANNEX 1

Limits for Determining Whether a Service of an Administration
Is Considered to Be Affected by a Proposed Modification to the Plan
or When It Is Necessary Under This Appendix to Seek the Agreement of Any
Other Administration

USA/ /72 ADD 4. Limits applicable to protect a frequency assignment in the band 17.3-18.1 GHz (Regions 1 and 3) and 17.3-17.8 GHz (Region 2) to a receiving space station in the fixed-satellite service (Earth-to-Space)

An administration in one Region shall be considered affected by a proposed modification in another Region (including cases covered by Resolution No. 41) when the power flux-density arriving at the receiving space station of a broadcasting-satellite feeder-link station exceeds a threshold value of (delta T/T)' corresponding to 3%

where:

(delta T/T)' is calculated in accordance with the method given in Appendix 29 for delta T/T, except that the maximum power densities are replaced by power densities averaged over the total RF bandwidth of the feeder link carriers (24 MHz for Region 2 and 27 MHz for Regions 1 and 3). The calculation shall be made for faded conditions, that is, the value of (delta T/T)' shall correspond to the value not exceeded for more than 1% of the worst month.

Reason: To adopt common, world-wide threshold values as proposed in section 5.2 of the Report of the CCIR JIWP/ORB(2) to determine the need to coordinate with an administration in another Region when modifications to the feeder link Plans or interim systems are initiated.

ANNEX 4

Criteria for Sharing Between Services

USA/ /73MOD ~~for Region 2~~

Threshold values for determining when coordination is required between a transmitting space station in the fixed-satellite service and a receiving space station in the feeder-link Plans in the 17.7-~~17.8~~ 18.1 GHz (Regions 1 and 3) and 17.7-17.8 GHz (Region 2)

With respect to paragraph 7.1, Article 7 of this Appendix, coordination of a transmitting space station in the fixed-satellite service with a broadcasting satellite in the Region 1 and 3 Plan or the Region 2 Plan is required, for inter-satellite geocentric angular separations less than ~~40°~~ 3° or greater than 150°, when the power flux-density arriving at the receiving space station of a broadcasting-satellite feeder-link station of another administration would cause an increase in the noise temperature of the feeder-link space station which, calculated in accordance with the method given in Appendix 29, exceeds a threshold value of (delta T/T)' corresponding to ~~10%~~ 4% where (delta T/T)' is calculated in accordance with the method given in Appendix 29 for delta T/T, except that the maximum power densities are replaced by power densities averaged over the total RF bandwidth of the feeder link carriers (24 MHz for Region 2 and 27 MHz for Regions 1 and 3). The calculation shall be made for faded conditions, that is, the value of (delta T/T)' shall correspond to the value not exceeded for more than 1% of the worst month. The above provision does not apply when the geocentric angular separation, between a transmitting space station in the fixed-satellite service and a receiving space station in the feeder-link Plan, exceeds 150° of arc and the free-space power flux-density of the transmitting space station in the fixed-satellite service does not exceed a value of -123 dB (W/m^2/24 MHz) for Region 2 and -123 dB (W/m^2/27 MHz) for Regions 1 and 3 on the Earth's surface at the equatorial Earth limb.

Reason: To adopt common, world-wide threshold values as proposed in section 5.2 of the Report of the CCIR JIWP/ORB(2) to determine when coordination is required between a transmitting space station in the Fixed-Satellite Service and a receiving space station in the feeder link Plans.

Agenda Item 7: Bidirectional use of the 10.7-11.7 GHz band in Region 1.

The Conference will consider, subject to the adoption of a suitable feeder link assignment plan for Region 1, the modification of the Radio Regulations to permit in Region 1 the use of the 10.7-11.7 GHz band (Earth-to-space) for all modes of Fixed-Satellite Service operation, taking into account the bands identified for planning in Agenda Items 1 and 2. Although the USA would not be directly affected by such a change, we recognize that a potential problem may exist for terrestrial and mobile communication networks as well as for fixed-satellite networks if certain types of use (e.g., bi-directional) were permitted. In addition, we recognize that there are potential inter-Regional interference concerns for near antipodal satellite operations in the FSS which will need to be taken into account.

The USA has no proposal on this Agenda Item at this time.

Agenda Item 8: Correction of minor errors in the Revision of Appendix 30 (ORB-85).

Appendix 30 (ORB-85) was adopted at the First Session of the Conference in order to incorporate the decisions of the 1983 Region 2 Broadcasting-Satellite Conference into the Radio Regulations. The objective was to modify the Radio Regulations in the most effective manner, so as to state the definitive inter-relationship between the radio communications services in the three Regions. These inter-relationships have been defined in Appendix 30 only on an interim basis pending the establishment of the Region 2 Plan.

This Agenda Item addresses the possible need to correct errors made at the First Session of the Conference when Appendix 30 was so modified. The IFRB, which was tasked by the First Session to prepare a list of possible errors, carried out a general review of both Appendix 30 (ORB-85) and Appendix 30A, including the latter appendix since it will be considered by the Conference with respect to feeder-link planning for Regions 1 and 3. The results of the review were provided to all administrations for comment. The USA considers the IFRB review to be both appropriate and comprehensive, and has commented on a number of the suggestions for clarifying the text.

When considering the Report of the IFRB on Agenda Item 8, the USA believes that the Conference should adopt those modifications to Appendices 30 and 30A which are required to provide a clear and comprehensive statement of the provisions of these Appendices, including explicit instructions to the IFRB and Secretary General. The USA is submitting some specific proposals on Appendix 30, Article 4.

In cases where the Appendices fail to establish the relationship between certain services, new decisions will be
USA/ /74 required. The USA proposes that the existing relationship between services already embodied in the Appendices be preserved and that those relationships be extended to bands and Regions not presently specified in the Appendices.

USA/ /75 Further, the USA proposes that the Appendices be aligned with modifications made to Articles 11 and 13 of the Radio Regulations, including dates of actions.

Since the comments of administrations are to be incorporated as appropriate in the IFRB Report, the USA will defer any proposals on this agenda item beyond those herein presented until the Report of the IFRB has been received.

APPENDIX 30

Provisions for All Services and Associated Plan
for the Broadcasting-Satellite Service in
Frequency Bands 11.7-12.2 GHz (in Regions 2 and 3)
and 11.7-12.5 GHz (in Region 1)

ARTICLE 4

Procedure for Modification of the Plan

USA/ / 76 SUP [1] (footnote)

USA/ / 77 ADD [1] (footnote) The intention to employ energy dispersal in accordance with values lower than those indicated in paragraph 3.18 of Annex 5 which would result in exceeding the limits shown in Annex 1 shall be treated as a modification except when the application of Resolution No. 42 has been requested by the notifitying administration.

Reason: To clarify the cases when the use of different technical parameters would require a modification to the Plans or the application of Resolution No. 42.

USA/ / 78 SUP 4.5.2

USA/ / 79 ADD 4.6 Information Requests by Administrations

The Board shall provide extracts of the Plans, including overall equivalent protection margins of each assignment, at any time upon the request of an administration.

Reason: To make the publication requirements of Appendix 30 consistent with the valid information requirements of Administrations, and to make it unnecessary to publish up-to-date versions of the Plan if extracts can be obtained as needed. This change would reduce the financial implications of the Radio Regulations.

Agenda Item 9: Satellite Sound-Broadcasting.

The possible introduction of sound BSS intended for individual reception by portable and automobile receivers has been the subject of considerable study since the First Session of the Conference. The United States is pleased with the progress of work on this issue in the CCIR. Considerable progress has been made by the CCIR in determining the parameters of possible systems and the possibilities that exist for this service to share frequencies which are also allocated to other radio services. In its work the CCIR has clearly shown that implementation of this service is technically feasible using the current level of technology.

The results of the work completed indicate that sound BSS will need to operate below approximately 3 GHz in order to provide reliable service to automobile receivers. We note that this part of the spectrum is already allocated to the Broadcasting, Fixed, Mobile and various satellite services. Therefore, before sound BSS can be operationally realized, a revision to the Table of Frequency Allocations is needed in order to establish either an exclusive or a shared allocation for the service. Since it is expected to be difficult to obtain an exclusive allocation, careful consideration needs to be given to identifying those system designs and those frequency assignment approaches which hold promise for permitting this service to share frequencies with other radio services.

We further note that although the band 2500-2690 MHz is already allocated to the Broadcasting-Satellite Service on a shared basis, power flux density limitations applied to this band through RR 757 prohibitively constrain introduction of sound BSS intended for individual reception by portable and automobile receivers.

The CCIR has concluded that spectrum sharing would be possible on the basis of geographic separation, and has provided information regarding sharing with the terrestrial Fixed, Mobile and Broadcasting services. Geographic sharing could mean that the introduction in a given geographic area of sound BSS services, operating in a shared band, would preclude the operation of other radio services on the same frequency in the same service area, and for some distance beyond. Clearly for such a frequency assignment approach to be acceptable, this approach for implementing sound BSS would need to be consistent with an administration's overall use of the spectrum. For this reason, the CCIR has given consideration to the utility of allocating a relatively wide frequency band for sound BSS, within which individual administrations could choose different sub-bands consistent with their differing use of the spectrum.

The USA supports the conclusions of Chapter 6 of the Report of CCIR JIWP/ORB(2) to this Conference, in particular the points raised above, which we believe provide an objective basis for assessing the technical and economic feasibility of satellite sound broadcasting. We note that the report does not propose specific changes to the Table of Frequency Allocations, but rather discusses methods of allocation that would minimize the difficulty of accommodating such services within the context of the existing frequency assignment procedures which differ from country to country. The USA supports the continuation of efforts to define further the system parameters, the costs, and technically and operationally suitable frequency bands for this service. We expect the Conference to determine the most appropriate directions for such future study. The USA may make a proposal on this Agenda Item at a later time.

Agenda Item 10: Long-term applicability of Resolution No. 2 (SAT-R2).

This agenda item completes the consideration of the decisions of the Region 2 BSS Conference, which was begun at the First Session. The 1983 Conference adopted Resolution No. 2 (SAT-R2) with the intention of enabling the administrations of Region 2 to implement the assignments in the Plans of that Conference according to a phased approach and with due regard to the protection of the services of other administrations. The provisional context for this procedure is described in Resolution No. 42 (ORB-85).

In essence, interim systems may be implemented only with the agreement of all affected administrations, if they use a coverage area or areas appearing in the Plans from an orbital position specified in the Plans, and if they do not exceed the power flux density limits given in Annex 5 of Appendix 30. The technical basis for determining the affected administrations is the same as is the case for a modification to the Plans. Thus, the administrations of Regions 1 and 3 will receive the same protection from Region 2 interim systems as from proposed modifications to the Region 2 BSS Plan. This was confirmed at the First Session of the Conference in a Report by the IFRB (see document No. 198).

In a further effort to minimize any inter-Regional impact of interim systems on the Fixed-Satellite Service, Region 2 decided to extend the agreement-seeking process to administrations with proposed FSS assignments that have been advance published in accordance with No. 1044 of the Radio Regulations, but have not yet entered into coordination in accordance with No. 1060 of the Radio Regulations, and the appropriate limits of Annex 1 of Appendix 30 have been exceeded. This was done in recognition of the long lead times required for the registration of FSS systems, and is not required by the Plan modification procedure or by Article 11 of the Radio Regulations for proposed FSS assignments.

The procedures of Resolution No. 2 (SAT-R2) are intended to be applied in cases where an administration would initially wish to use characteristics different from those appearing in the Plans, subject to the above conditions, but intends to implement its assignments in the Plans at a later date. In order to implement an interim system under this procedure, an administration must suspend one or more assignments appearing in the Plan. The suspended assignments may not be brought into use before the cessation of use of the interim system. This approach provides an alternative to Plan modification which may be attractive to administrations. A mechanism is provided for

establishing the right to implement the interim system, but not its protection, which must be derived from the protection of the suspended Plan assignments, with due regard to the protection of the services of other administrations. The key distinguishing feature of these procedures is the suspension of the corresponding assignment(s) in the Plan. By suspending assignments, the total impact of the administration's proposal is minimized, and the successful application of the procedures is facilitated.

The USA considers the procedure contained in Resolution No. 2 (SAT-R2) to be an essential component of any provisions intending to facilitate the introduction of BSS services. This provision was adopted by the Regional Administrative Conference for the Planning of the Broadcasting-Satellite Service in Region 2 (SAT-83) so as to provide such flexibility in the implementation of the Region 2 Plan, while providing for the protection of other services in Regions 1 and 3, as well as Region 2. Since these procedures provide an appropriate mechanism to ensure the same protection from Region 2 interim systems as from proposed modifications to the Region 2 BSS Plan, their definitive adoption would be entirely consistent with the provisions of Appendix 30(ORB-85). Therefore, the USA is proposing that the provisions of Resolution No. 2 (SAT-R2) be definitively incorporated into the Radio Regulations for application in Region 2 by making Resolution No. 42 (ORB-85) permanent and including the provisions of the annex to Resolution No. 2 (SAT-R2) explicitly in the text.

USA/ /80 MOD

RESOLUTION NO. 42

Relating to ~~The Provisional Application for Region 2 of Resolution No. 2 (Sat-R2)~~
Interim Systems for the Region 2 BSS Plan

MOD The World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Utilitizing It (~~First~~ Second Session - Geneva, ~~1985~~ 1988).

considering

SUP e)

ADD e) that ORB-85 adopted the provisions of Resolution No. 2 (SAT-R2) on a provisional basis pending review by ORB-88;

MOD f) that the question of the long-term application of the provisions of Resolution No. 2 (SAT-R2) ~~should be~~ has been studied [further];

resolves

SUP 1.

SUP 2.

ADD that administrations and the IFRB shall apply the procedure contained in the Annex to this resolution when requested by an administration of Region 2.

SUP invites

ADD ANNEX

(Append here the Annex to Resolution No. 2 (SAT-R2), substituting as appropriate in the text references to Part I and Part II of the Final Acts of SAT-R2 with references to Appendix 30 (ORB-88) and Appendix 30A (ORB-88), respectively.)

Reason: Resolution No. 2 (SAT-R2) contains the interim systems procedure adopted by the 1983 RARC SAT-R2, and provisionally by WARC-ORB-85, for the Region 2 broadcasting plan. It permits great flexibility in implementation of first generation BSS networks and therefore should be adopted on a permanent basis.

Agenda Item 11: High Definition Television.

This subject has also been intensively studied by the CCIR. In the course of the CCIR study, the technical aspects of this issue have been clearly resolved. In the following, some of the key aspects of Chapter 7 of the Report of JIWP-ORB-88 on this matter have been presented for the benefit of a discussion on this matter at the Conference.

The CCIR Report reviewed the existing world-wide allocations to the BSS and concluded that some use of the existing 12 GHz BSS band can be made for HDTV transmission using single-channel, highly compressed signal formats at the expense of a significant reduction in the number of available programs, for formats using two (not necessarily contiguous) RF channels. However, the Report concluded that the 12 GHz BSS band, as planned, will not accommodate single wide-RF channel analog or digital HDTV signals on a world-wide basis. A solution to this problem would facilitate the orderly development of the BSS since such wide-RF channel HDTV channels may be required in a second generation approach to the BSS transmissions of HDTV. We note, however, that the implementation of bandwidth compressed systems would not depend upon a solution to this problem, unless local standardization of emissions exists in a given area.

The Report generally discounted the applicability of other existing BSS bands for wide-RF channel HDTV, particularly when sharing with the fixed service or inter-satellite service would be required. The case of 22.5-23 GHz is an example cited, where the sharing environment may result in severe constraints on the power or orbital positions employed by the BSS. In discussing possible new allocations from the perspective of propagation and sharing, the Report stated that it would be preferable to consider a band somewhat lower than 22.5 GHz to economize in satellite power. In particular, the possibility of using bands allocated to the FSS in the Earth-to-space direction was considered. The case of 17.3-17.7 GHz was favorably noted. In this FSS band sharing with a new BSS allocation may be somewhat easier since there is no allocation to the fixed service and the use of the FSS is limited to feeder links to the BSS. This limitation should reduce the number of FSS earth stations that would share the band with the BSS earth stations. However, the Report concluded that further study of this option would be required to determine if it is a viable solution.

The CCIR Report concluded that a world-wide allocation to the BSS on the order of 500 MHz, preferably not above 23 GHz, should be sought to enable the introduction of world-wide wideband HDTV, and noted that such an allocation would even be required for narrow RF band HDTV in those countries already

fully using their assignment in the Regions 1 and 3 BSS Plan at 12 GHz.

The USA considers the existing allocations to the BSS to provide an adequate basis for the initial development of HDTV within the Broadcasting-Satellite Service in our country. From our point of view, this Agenda Item addresses spectrum requirements that may only materialize in the longer term. Since the future use of the BSS in the United States cannot be determined at this time, we have decided not to advance a specific proposal on this issue, other than to note the valuable technical discussion contained in the CCIR Report.

We note that the Report does not suggest a suitable frequency allocation, but rather discusses the size of an allocation that would be required for the introduction of wide-RF band HDTV on a world-wide basis, and the interference situations that would result in bands around 12 GHz and above, within and between BSS and other services now allocated to these bands on a primary basis. The USA is proposing that the Conference reaffirm the conclusions of the CCIR Report mentioned above, noting that in the view of some administrations, including the USA, the need for a new world-wide allocation to the BSS cannot be foreseen at this time. The USA is further proposing in a Resolution that studies should continue with the goal of finding a technically and operationally suitable frequency band and developing appropriate sharing criteria that would, if adopted by a future competent administrative radio conference, permit the future provision of wide-RF band HDTV by satellite without compromising the rights of other radio communications services.

USA/ /81 ADD

RESOLUTION NO. A

Relating to the Question of a Suitable Frequency Band for the Broadcasting-Satellite Service, Preferably on a World-Wide Basis, to Accommodate HDTV

The World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of Space Services Utilizing It (Second Session - Geneva, 1988),

considering

a) that this subject has already been intensively studied by the CCIR;

b) that some use of the existing allocations to the broadcasting-satellite service at 12 GHz can be made for HDTV transmissions using single-channel, highly compressed signal formats;

c) that the 12 GHz band, as planned, will not accommodate single wide-RF channel analog or digital HDTV signals on a world-wide basis;

d) that the sharing environment in the 22.5-23 GHz band, currently allocated to the broadcasting-satellite service in Regions 2 and 3, may result in severe constraints on systems in not only the broadcasting-satellite service but also in the fixed-satellite service and the inter-satellite service;

e) that an allocation on the order of 500 MHz to the broadcasting-satellite service would be required to enable the introduction of world-wide wide-RF band HDTV: however, not all administrations can foresee the need for this allocation at this time;

f) that, based on the properties of propagation, the bands below 22.5 GHz are preferable to economize on satellite e.i.r.p.;

resolves

1. to invite the CCIR to continue its studies with the goal of finding a technically and operationally suitable frequency band and developing appropriate sharing criteria that would, if adopted by a future competent administrative radio conference, permit the future provision of wide-RF band HDTV by satellite.

Reason: To reaffirm the conclusions of the CCIR Report and to continue study of this matter.

Agenda Item 12: Consequential amendments.

The USA does not intend to submit specific proposals relating to this Agenda Item at this time, but consequential amendments to the Radio Regulations may be identified in further preparation for the Conference.

Agenda Item 13: Revisions and actions on Resolutions and Recommendations.

The USA has concluded that most of the Resolutions and Recommendations within the ITU Radio Regulations relating to space services remain appropriate and applicable. However, certain Resolutions and Recommendations, such as Resolution No. 3, can be suppressed because WARC-ORB-85/88 and other Regional Conferences will have taken the necessary steps to complete action on these resolutions. Certain other Resolutions and Recommendations are being considered for modification to reflect changes in the Radio Regulations or actual experience in the use of satellite systems. The USA may submit specific proposals relating to this Agenda Item at a later time.

Agenda Item 14: Future planning of the 18.10-18.30 GHz, 18.30-20.20 GHz and 27.00-30.00 GHz bands.

The future requirements for the Fixed-Satellite Service operating above the 18.1 GHz band are not sufficiently known at this time. In some portions of the 4, 6, 11, 12 and 14 GHz bands and in some arcs of the geostationary-satellite orbit, there exists a relatively intensive use of satellites operating in the Fixed-Satellite Service. However, in the 18.10-18.30 GHz, 18.30-20.20 GHz and 27.00-30.00 GHz bands, there exists little developed technology and little operating experience. The CCIR has been studying the technical characteristics of the Fixed-Satellite Service in these bands. In its Report to the Second Session, the CCIR notes the need to develop more extensive data on propagation and fade countermeasures before the bands are subject to planning.

The USA proposes that the 18.10-18.30 GHz, 18.30-20.20 GHz and 27.00-30.00 GHz bands not be considered for any planning at this time. Articles 11 and 13 procedures should continue to be used to implement satellite systems in these frequency bands.

Agenda Item 15: MF Broadcasting (Revision of RR 480).

The USA has concluded that it is not appropriate to make a proposal on this Agenda Item at this time. It is expected that a revision of this regulation will be drafted at a regional conference in May 1988 and that the text of this revision will be referred to the Second Session of the Conference for adoption. The USA may make a proposal on this Agenda Item at a later time.

Agenda Item 16 - Budget considerations.

Several concerns have been raised related to budget considerations for intersessional period activities and to the expenditures of funds necessary to accomplish the work of the Conference. The USA believes that ITU expenditures for the Second Session and the associated intersessional work have been limited by the Plenipotentiary Conference, Nairobi, 1982. In addition, the Second Session in making its decisions to accomplish the objectives of the Conference should be aware of and consider the financial implications and other potential impacts upon the resources of the ITU Secretariat, the IFRB and the CCIR. The USA supports the Convention-directed mandate for the ITU to exercise fiscal constraint within the guidelines established by each Plenipotentiary Conference.

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